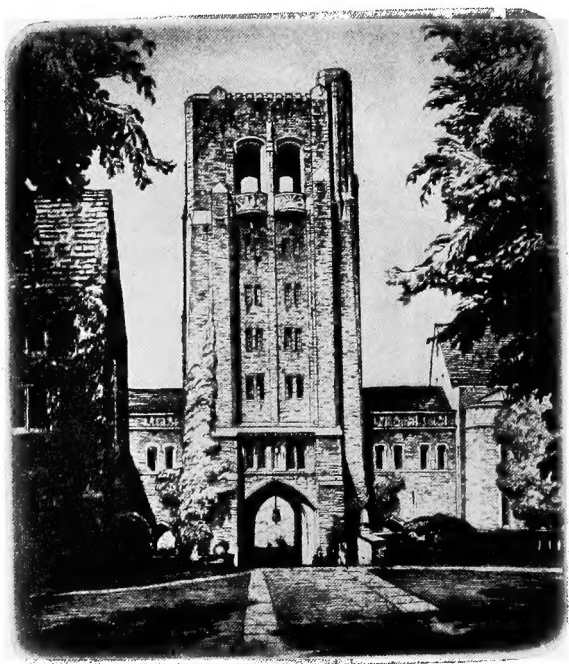




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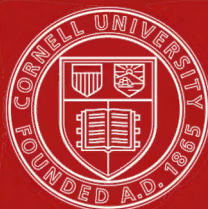


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MR. SERJEANT STEPHEN'S  
COMMENTARIES  
ON THE LAWS OF ENGLAND.  
(PARTLY FOUNDED ON BLACKSTONE.)

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Table of Contents.]

MR. SERJEANT STEPHEN'S  
New Commentaries  
ON THE  
LAWS OF ENGLAND

(PARTLY FOUNDED ON BLACKSTONE.)

BY  
HIS HONOUR JUDGE STEPHEN.

*"For hoping well to deliver myself from mistaking, by the order and  
"perspicuous expressing of that I do propound, I am otherwise zealous and  
"affectionate to recede as little from antiquity, either in terms or opinions,  
"as may stand with truth, and the proficience of knowledge."*

—LORD BACON, *Adv. of Learning*.

Sixteenth Edition,

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—  
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OF THINGS PERSONAL, AND OF PROPERTY  
THEREIN, IN GENERAL.

‘THINGS personal’ fall under the older and more general denomination of *chattels* or *goods and chattels* (a); the term ‘chattel’ being also applicable to *chattels real* (b), which, although they are personal property, are in fact interests in real estate, and have consequently been considered in the First Part of the

(a) Co. Litt. 118 b.

(b) Co. Litt. *ubi sup.*

present Book (a). The chattels to which our attention will now be directed include only moveables, and rights connected with moveables, known sometimes as *choses in action*; such as patent rights, copyright, the right to a trade-mark or trade name, the right to a design, and the right to a debt. All such things, to distinguish them from chattels real, are known as ‘chattels personal.’

[Things personal, then, comprise in the first place all sorts of things moveable, that is, such as may attend a man’s person wherever he goes. These, being for the most part of a perishable quality, were not esteemed of so high a nature, nor paid so much regard to by the common law, as things that are in their nature immoveable and more permanent, such as land and houses, and the profits issuing thereout. In fact, during the feudal ages, the amount of personal estate was comparatively very trifling, *e.g.*, a tax of the *fifteenth*, *tenth*, or sometimes a much larger proportion of all the moveables of the subject, was frequently laid without scruple; and forfeitures were occasionally inflicted by the common law of all a man’s goods and chattels, for misbehaviours and inadvertencies that at present hardly seem to have deserved so severe a punishment. But in modern times, through the extension of trade and commerce, and the progress of the arts and sciences, personal property has greatly augmented both in amount and in quality; and our courts now attach to it an importance equal to that which they attach to real property.

Moveables consist, in the first place, of inanimate things, such as goods, plate, money, and the like, or vegetable productions, such as the fruit or other parts of a plant, when severed from the body of it, or the whole plant itself when severed from the ground; in

(a) See *ante*, bk. ii., pt. i., ch. v. (vol. i., pp. 176-190).

[the second, under the name of moveables, we have to include animals, which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another. These, in early stages of civilisation, form the principal part of the wealth of a community ; and the earliest rules of law are very generally concerned with them.

We will, therefore, direct our attention first to animals. These, when regarded as the subjects of ownership, are distinguished into such as are *domitæ naturæ* and such as are *feræ naturæ* ; some being of a tame, and others of a wild, disposition. In the case of animals *domitæ naturæ*, i.e., animals of a nature tame and domestic, such as horses, kine, sheep, poultry, and the like, a man may have as absolute a property in them as in inanimate things ; because they continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property in them. But with animals *feræ naturæ*, the case is different. These are, generally speaking, not the subjects of absolute property, at least while living (a). But under certain circumstances a man may be invested with a qualified or special property in them ; and this either *per industriam*, or *propter impotentiam*, or *propter privilegium*.

1. Such a property may arise in them *per industriam* ; that is to say, either by reclaiming and making them tame by art, industry, and education, or else by so confining them that they cannot escape and use their natural liberty. Some writers have ranked all the domestic animals we have mentioned under the

(a) *The Case of Swans* B. & C. 934 ; *Reg. v. Read* (1592) 7 Co. Rep. 15 b ; (1878) 3 Q. B. D. 131.  
*Hannum v. Mockett* (1824) 2



[head of animals *feræ naturæ*, apprehending none to be originally and naturally tame, but only made so by art and custom; inasmuch as horses, swine, and other cattle, if originally left to themselves, would have chosen to rove up and down seeking their food at large (a), and are only made domestic by use and familiarity, and are, therefore (say they), called *mansueta, quasi manui assueta*. But, however well this notion may be founded, abstractedly considered, our law apprehends the most obvious distinction to be between such animals as we generally see tame, and seldom, if ever, find wandering at large, which it calls animals *domitæ naturæ*, and such creatures as are usually found at liberty, which are therefore supposed to be, more emphatically, *feræ naturæ*; though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Instances of these are deer in a park, hares or rabbits in an inclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, fish in a private pond, bees when hived, and the like. And with regard to bees, in particular, it has been said that, though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nests therein; and therefore, if another hives them, he shall be their proprietor. But a swarm which fly from and out of my hive are mine, so long as I can keep them in sight and have power to pursue them; and in these circumstances no one else is entitled to take them. But it has also been said, that with us the only ownership in bees is *ratione soli*; and the *Carta de Forestâ*, which allowed every freeman to be entitled to the honey found within his own woods, affords some countenance to this doctrine: that a qualified property

(a) *Read v. Edwards* (1864) 17 C. B. N. S. 255, 258.

[may be had in bees, in consideration of the property of the soil whereon they are found (*a*).

With respect to all animals *feræ naturæ*, they are no longer the property of a man than while they continue in his keeping or actual possession. If at any time they regain their natural liberty; his property in them instantly ceases, unless indeed they have the *animus revertendi*—which is only to be known by their usual custom of returning (*b*)—or unless instantly pursued by the owner, for during such pursuit his property remains.] On the other hand, a property of this description is protected, while it lasts, by law; so that an action for damages will lie against any one who detains animals *feræ naturæ* from the owner for the time being, or who unlawfully destroys them (*c*). And it is penal to steal those animals *feræ naturæ*, which, being fit for food or for the service of man, are either tame and known by the thief to be so, or are so confined that the owner can take them whenever he pleases (*d*). And although, as regards animals kept only for pleasure, curiosity, or whim, amongst which the common law classed dogs and singing birds (*e*), no protection was at one time afforded by the criminal law; still it has long been recognised that they are the subjects of a property protected by civil remedies (*f*). By modern legislation, the protection of the criminal law is now given to property in all species of confined animals (*g*). And it appears, that *hawks* were peculiarly protected, even by the common law (*h*).

(*a*) *Carta de Forestâ* (A.D. 1217) c. 13 (Stubbs, *Charters*, p. 350); *Hannam v. Mockett* (1824) 2 B. & C. 944.

(*b*) Bract. l. 2, ch. 1; Justinian, Inst. l. 2, 1, 15.

(*c*) Bro. Abr. *Trespäss*, 407.

(*d*) 1 Hale, P. C. 512; 1 Hawk. P. C. c. 33, s. 26.

(*e*) Lamb. *Eiren*. 275.

(*f*) Bro. Abr. *Trespäss*, 407; *Filow's Case* (1520) Y. B. 12 H. 8 p. 3; *Ireland v. Higgins* (1593) Cro. Eliz. 125; *Sandys v. Hodgson* (1839) 10 A. & E. 472.

(*g*) See *post*, vol. iv. pp. 101–102.

(*h*) 1 Hale, P. C. 512; 1 Hawk. P. C. 38.

2. [A qualified property in animals *feræ naturæ* may arise also *propter impotentiam*, that is to say, on account of their own inability. Thus, when hawks, herons, or other birds build in my trees, or coneys or other creatures *feræ naturæ* make their nests or burrows in my land, and have young ones there, I have a qualified property in those young ones till such time as they can fly or run away; and then my property expires (a). For, in these cases, the law vests a property in the owner of the land in respect of the young, in the same manner as it does of the parents if reclaimed and confined; for these cannot, through weakness, any more than the others through restraint, use their natural liberty, and forsake him.

3. Lastly, a man may have a qualified property in animals *feræ naturæ*, *propter privilegium*; that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in such animals (usually called *game*), so long as they continue within his liberty; and may restrain any stranger from taking them therein. But the instant they depart into another liberty, the qualified property of the prior owner ceases (b).]

Passing now from the consideration of animals *feræ naturæ*, to the consideration of personal property generally, we will first observe, that chattels personal

(a) *The Case of Swans* (1592) 7 Rep. 17 b.

(b) See *post*, pp. 20–21; and *Sutton v. Moody* (1697) 1 Ld. Raym. 250; *Blades v. Higgs* (1866) 11 H. L. C. 621. The right which a man has to take animals *feræ naturæ* upon his own land is sometimes also spoken of as a ‘possessory

‘property’ (e.g., in *Sutton v. Moody*), *ratione soli* or *loci*. But it differs materially from the right *propter privilegium*; which is independent of ownership of the soil, and is not defeated when the animals are wrongfully driven out of the liberty.

may be either *choses in possession*, or else *choses in action*—a distinction which is attended with certain important consequences in the law. *Choses in possession* are those chattels of which a man has the present enjoyment, either actual or constructive. They are divided into two kinds, according to whether one has an *absolute* or a *qualified* property in them. In the former case, a man is fully and completely the proprietor or owner of the thing; in the latter case his ownership is of a special or limited kind. Of *special* or *qualified property*, as exemplified in the case of animals *feræ naturæ*, we have already spoken. [But the phrase *special property* (sometimes called qualified property) has another and more important meaning, which may be illustrated by the case of *bailment*.

A bailment is the delivery of chattels by the owner thereof to another person for a particular purpose, for instance, to a carrier to convey to London, or to an innkeeper to secure in his inn, or the like. Here there is no absolute property for all purposes in either the bailor or the bailee. For the bailor has only the right, and not the immediate possession; and the bailee has the possession, but only a temporary right. There is therefore a qualified property in them both; and each of them is entitled to an action against any stranger by whom the goods are wrongfully damaged or taken away—the bailee on account of his immediate possession and the special property incident thereto (*a*), the bailor on account of his general ownership—unless indeed the bailor has parted with his present right to possession of the goods, in which case he will have at the most an action for such damage as he has actually sustained (*b*).] But, save as aforesaid, the absolute property for all purposes remains in the bailor.

Similarly, where goods are acquired by *finding*,

(*a*) *The Winkfield* [1902] P.  
42.

(*b*) *Gordon v. Harper* (1796)  
7 T. R. 9

the finder has a special property therein, defeasible, it is true, upon discovery of the rightful owner, but in the meantime valid against the rest of the world (*a*)—subject, in the case of treasure-trove (*b*), to the superior title of the Crown (*c*), and, in the case of chattels which (although not treasure-trove) are found buried in the land of another, to the title of the owner of the soil (*d*). On the other hand, a servant who has the care of his master's goods—as a butler of plate, a shepherd of sheep, and the like—has not any property therein, either absolute or qualified, but only a mere charge or oversight (commonly called 'custody') of the goods; and his master's property therein remains absolute (*e*). So, too, where plate or the like articles are set before guests at an inn, or in a private house, for their use, they are not deemed to have any possession of such things; 'for it is no bailment, but a 'special use to a special purpose' (*f*). And when goods are distrained for rent, no property, special or otherwise, is acquired in them by the party distraining or seizing. But they remain *in custodia legis*, until sold or otherwise lawfully disposed of; and, in the meantime, the property of the original owner remains in him unaltered (*g*). But, if goods be taken in execution, the sheriff or other officer executing the process has a special property in them during the interval between the seizure and the actual sale; though the absolute property remains in the debtor (*h*).

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|--|--|
| ( <i>a</i> ) <i>Armory v. Delamirie</i> (1722) Str. 505; <i>Bridges v. Hawkesworth</i> (1851) 21 L. J. Q. B. 75. | <i>Sharman</i> [1896] 2 Q. B. 44.  |
| ( <i>b</i> ) See <i>post</i> , pp. 651–652.  | ( <i>e</i> ) 3 Inst. 108.  |
| ( <i>c</i> ) <i>A.-G. v. Trustees of British Museum</i> [1903] 2 Ch. 598.  | ( <i>f</i> ) <i>Ibid</i> .   |
| ( <i>d</i> ) <i>Elwes v. Brigg Gas Co.</i> (1886) 33 Ch. D. 562; <i>South Staffordshire Water Co. v.</i>         | ( <i>g</i> ) 2 Wms. Saund. 47, n. (c); <i>R. v. Cotton</i> (1751) Parker, 121. Cf. <i>Giles v. Grover</i> (1832) 9 Bing., at p. 153. |
|  | ( <i>h</i> ) <i>Wilbraham v. Snow</i> (1669) 2 Wms. Saund. 47; <i>Giles v. Grover</i> (1832) 1 Cl. & F. 72; Sale of Goods Act,       |

With regard to *choses in action*, these are things of which a man has not the possession (either actual or constructive), but merely the right to recover it by action. They comprise, as well corporeal things not in possession of the owner, as incorporeal chattels which have only a notional existence, such as debts, stocks, shares, debentures, and patent and trade-mark rights. [Thus, money due on a bond is a *chose in action*, for there is a right to claim the money when payable; but there is no possession of it until recovered by course of law, or until payment is voluntarily made. And so, if a man promise or covenant with me to do any act, and fail in it, whereby I suffer damage, the recompense for this damage is a *chose in action*. For though a right to some recompense vests in me at the time of the damage done; yet what and how large such recompense shall be, can only be ascertained by law, and possession can only be given me by legal judgment and execution (a). Future interests in personal property, whether settled by the interposition of trustees or not, are also *choses in action* (b).

Property in chattels personal, whether in possession or in action, is subject to distinctions which regard, first, the quantity of interest and the time of enjoyment, and, second, the number of owners. For a man may have the total property of a chattel, analogous to the fee simple in a real estate, or he may have an interest in it for life only, or for years only. The creation of limited and successive interests in personal property is, however, subject to rules which do not apply to real estate.

1893, s. 26; *Johnson v. Pickering* [1907] 2 K. B. 437; [1908] 1 K. B. 1.

(a) As to the scope of the term *chose in action*, see *Colonial Bank v. Whinney* (1885) L. R. 11 App. Ca. 426;

*Torkington v. Magee* [1902] 2 K. B. 430. See also *post*, ch. v. sect. xii. pp. 249–250.

(b) *Re Tritton* (1889) 61 L. T. 301; *Re Thynne* [1911] 1 Ch. 282.

[In the first place, there cannot be an estate tail in chattels personal either at law or in equity; and, therefore, if they be given by deed or will to A. and the heirs of his body, the total property is vested in A.; and the remainders over take no effect (a). This rule applies also to the case of leaseholds so limited (b). And, in the case of a personal annuity granted in fee by the Crown out of certain Colonial duties, it was held that this was not real estate, and therefore not entailable, and that a settlement of the annuity upon A. and the heirs of her body gave a fee simple conditional at the common law (c). But annuities of this kind do not commonly occur at the present day.

In the second place, by the rules of the ancient common law there could be no future property in chattels personal created so as to take effect in expectancy; because, owing to their being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would have occasioned perpetual suits and quarrels, if such limitations in remainder were generally tolerated or allowed. But yet in last wills and testaments, such limitations of personal goods and chattels, in remainder after a bequest for life, were permitted (d). Originally this indulgence was only shown when merely the use of the goods, and not the goods themselves, was given to the first legatee; the property being supposed to continue all the time in the executor of the testator. But now these distinctions are disregarded in the case of wills (e); for if a man by will limits his books,

(a) *Seale v. Seale* (1715) 1 P. Wms. 290; *Lyon v. Mitchell* (1816) 1 Madd. 467.  
 (b) *Leventhorpe v. Ashbie* (1636) Rolle's Abr. 831, pl. 1.  
 (c) *Earl of Stafford v. Buckley* (1751) 2 Ves. Sen. 171.  
 (d) *Stevenson v. Liverpool* (1875) L. R. 10 Q. B. 81.  
 (e) *Anon.* (1695) 2 Freem. 206; *Randall v. Russell* (1817) 3 Mer. 190, at p. 195.

[furniture, or other chattels to A. for life, with remainder over to B., this remainder is good—if not as a remainder strictly so called, at all events as an executory interest, which for this purpose is the same thing (a).] The only exception to this rule is the case of things *quæ ipso usu consumuntur* ; a gift of which to a person for life, if specific, will vest in him the absolute ownership (b), unless such things are given as part of a stock in trade (c).

It seems, however, that, even at the present day, successive legal interests in chattels cannot be created *inter vivos* ; and, even in the case of dispositions by will, it would be extremely imprudent to give a legal interest to the first taker, whereby the property could be put at his mercy, to the prejudice of those whom the testator meant to take after him. For this reason it is the practice in settlements, whether made *inter vivos* or by will, to vest the whole ownership in trustees, who hold the property upon trust for the successive beneficiaries, for such interests as the settlor may choose to give. For there has never been any doubt that, in equity, limited interests in chattels can be created, as effectually as in the case of land ; except, as already stated, that they cannot be held for an estate tail. Thus stocks, shares, and other *choses in action*, as well as, more rarely, *choses in possession*, such as jewellery and articles of *vertu*, are frequently assigned to trustees by way of settlement on marriage or otherwise.

Personal chattels, however, cannot by any method be rendered inalienable beyond the period prescribed by the law against perpetuities, which applies to

(a) *Fearne, Cont. Rem.* p. 402. (1872) 13 Eq. 432 ; *Breton v. Mockett* (1878) 9 Ch. D. 95.

(b) *Randall v. Russell*, *ubi sup.* Cf. *Myers v. Washbrook* [1901] 1 Q. B. 360.

(c) *Cockayne v. Harrison*



limitations of interests in personalty as well as to interests in real estate (*a*). They also fall, equally with real estate, within the provisions of the Accumulations Act, 1800 (commonly known as the Thellusson Act), and the Accumulations Act, 1892 (*b*); the general effect of which two Acts is to invalidate all directions, whether by will or other instrument, for the accumulation of the annual produce of property for any longer time than one of the alternative periods specified in the Acts. But the rule that a limitation of an interest to the issue of an unborn person cannot be validly made if in the same instrument a limitation of an interest in the same property is made to that person, has no application to limitations of personal property (*c*).

[Second, as to the number of owners. Things personal, as well as things real, may belong to their owners, not only in severalty, but also in joint tenancy, or as tenants in common. They cannot, however, be vested in co-parcenary; because the beneficial interest in them does not descend from ancestor to heir, which is necessary to constitute co-parceners. If a horse or other personal chattel be given to two or more absolutely, they are joint tenants thereof; and, unless the joint tenancy be severed, the same doctrine of survivorship takes place as in estates in lands and tenements (*d*). In like manner, if the joint tenancy be severed, as by either of them selling his share, the purchaser and the remaining part-owner become tenants in common, without any *jus accrescendi* or survivorship (*e*). So, also, if £100 be given by will to two or

(*a*) Co. Litt. by Harg. 20 a, n. (5); Gilb. *Uses*, by Sugd. 121, n. (4); see *ante*, vol. i. pp. 439-441.

(*b*) See *ante*, vol. i. pp. 441-443.

(*c*) *Re Bowles* [1902] 2 Ch. 650. See *ante*, vol. i. p. 220.

(*d*) Litt. s. 281.

(*e*) *Ibid.* s. 321; *Re Wilks* [1891] 3 Ch. 59.

[more, *equally to be divided* between them, this makes them tenants in common ; as we have formerly seen such words would have done in regard to a devise of real estate. It is, however, well established, that chattels and other kinds of personal property, as well as real property, belonging to several persons carrying on business in partnership, are to be considered, in equity, as common, and not as joint property ; and there is no survivorship therein, so far as the beneficial interest is concerned (a). This principle is expressed in the maxim : *Jus accrescendi inter mercatores locum non habet.*] But, so far as the legal ownership is concerned, partners may be joint tenants of the partnership property ; and, in such a case, the survivor or his representative can pass the legal ownership, and, if the conveyance is made in due exercise of his powers, or is made to an innocent purchaser for value, can give a good title (b).

(a) Co. Litt. 182 a ; *Waterer* edn.) p. 379 ; *West of England Bank v. Murch* (1883) 23 Ch. D. 138 ; *Re Clough* (1885) 402.

(b) Lindley, *Partnership* (7th edn.) p. 379 ; *West of England Bank v. Murch* (1883) 23 Ch. D. 138 ; *Re Clough* (1885) 31 Ch. D. 324.

## CHAPTER II.

OF TITLE TO THINGS PERSONAL—AND FIRST OF  
TITLE BY OCCUPANCY.

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[WE shall now proceed to consider the *title* to things personal, or the various means of acquiring and of losing such property as may be had therein. Both of these considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property ; since it is, for the most part, impossible to contemplate the one without contemplating the other also. And there are six modes of making title to things personal, which we shall have occasion to consider ; and these are :—

1. Occupancy ;
2. Invention ;
3. Gift and assignment ;
4. Contract (*a*) ;
5. Bankruptcy ; and
6. Will and administration.

And, first, the title by OCCUPANCY—which, we have

(*a*) Although it has been thought right not to disturb the arrangement by which in this work contract is treated as one of the modes of acquiring title to property in things personal (an arrangement consecrated by the example of Blackstone, who wrote at a time when the importance of

contract as a distinct branch of the law was hardly realised), it is well to warn the student that in itself contract is not a title to property in the sense in which that term is applied to the other matters here enumerated. See the introductory paragraph of ch. v.

[more than once remarked, was the original method of acquiring property, and which is still permitted to subsist in certain cases.

1. Thus, in the first place, it was formerly said, that anybody may seize to his own use such goods as belong to an alien enemy (*a*): for such enemies, not being looked upon as members of our society, are not entitled, during their state of enmity, to the benefit or protection of our laws. This doctrine is, however, in modern times, restrained, as regards seizures on the high seas, to such captors as are authorised by the public authority of the Crown (*b*).] The Declaration of Paris, of 1856, to which Great Britain was a party, has further limited the possibility of a valid capture at sea, by abolishing privateering, *i.e.*, the practice of authorising private persons to make captures. Moreover, enemies' goods carried in neutral ships are thereby protected from capture, except in cases of contraband and blockade-running.

[As regards inland seizures, the right of capture is limited to such goods as are brought into this country by an alien enemy, after declaration of war, without a safe-conduct or passport (*c*). And therefore it has been held, that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized (*d*); and if a contract be made with a foreigner during peace, the right of action upon it is not absolutely forfeited by the subsequent outbreak of war between his country and ours, but is simply suspended

(*a*) Finch, *Discourse*, 178.

(*b*) *The King v. Williamson* (1672) Freem. 40.

(*c*) The right of private persons to make inland seizures of enemy goods seems to be obsolete in England. See,

however, *The Johanna Emilie* (1853) Spinks, 14, and Hall, *International Law* (6th edn.) pp. 432–436.

(*d*) Bro. Ab. *Propertie*, 38, *Forfeiture*, 57.

[until peace be again restored (a). But where the circumstances of the case render the capture from an enemy legal, the title by capture, *i.e.*, by occupancy, is good ; and so good in fact, that, by our more antient law, such title would sometimes have prevailed, even against the claim of the former true British owner, from whom the goods had been previously taken by the same enemy. For the law of this country in such a case was, that goods and chattels so recaptured became vested in the recaptor, unless the recapture was on the same day as the first capture, and the owner before sunset put in his claim to them (b)—a doctrine agreeable also to the law of nations, as understood in the time of Grotius (c).

But the law of recapture at sea was much modified after the time of Grotius ; and the later authorities required, that, before the goods became the property of the captors, they must have been brought into port, and have continued a night *infra præsidia*, in a place of safe custody (d), and, further, that, in order to vest such property in the captors, so as to bar the title of the original owner thereto, the vessel must have been condemned *as prize*, by legal sentence.] As regards ships or goods belonging to British subjects, according to the present law, now embodied in the Naval Prize Act, 1864, whatever period of time may have intervened between the capture and any such claim, and whether sentence of condemnation of the vessel has been obtained or not, the goods must in all cases be restored to the original owners on payment of prize salvage (not exceeding one-eighth or, in exceptional cases, one-fourth of the value) as may be agreed between the

(a) *Flindt v. Waters* (1812)  
15 East, 260 ; *Clemontson v.*

*Blessig* (1856) 11 Exch. 135.

(b) Bro. Ab. *Propertie*, 38,  
*Forfeiture*, 57.

(c) *De Jure Belli ac Pacis*,  
l. 3, c. 6, s. 3.

(d) Bynkersh. *Quæst. Jur.*,  
Pub. l. 1, c. 4.

parties or awarded by the Prize Court ; except that the rule of restitution does not apply to ships which after capture have been employed in the public military service of the enemy (*a*). The benefit of the English rule has in practice been given to allies by the English Courts ; unless the allied country applies a less liberal rule in regard to British vessels (*b*).

On the other hand, as regards captures from the enemy (that is to say, from alien owners being enemies), goods so captured are called *naval prize of war* ; and the title thereto and the distribution of such goods are now regulated by the Naval Prize Act, 1864, under which all questions are referred to the jurisdiction of the Prize Courts. This jurisdiction is now ordinarily exercised by the Admiralty Division of the High Court of Justice, and may (in certain cases) be exercised by the Colonial Courts of Admiralty (*c*).

2. [Again, with regard to animals *feræ naturæ*, all mankind had an original natural right (*d*) to pursue and take any fowl of the air, any fish of the sea, and any beast of the field ; and this right still continues in every individual, except so far as it has been restrained by the laws of the country. By the law of England, accordingly, all persons may, generally speaking, on their own lands, or on the high seas, exercise this right ; though it was formerly the exclusive right of the monarch to take certain royal fish, such as the whale and sturgeon (*e*). Animals so captured by a private individual become, subject to the conditions already

(*a*) Naval Prize Act, 1864, s. 40.

(*b*) *The Santa Cruz* (1798) 1 C. Rob. 50 ; Manual of Prize Law, xix. 271.

(*c*) Colonial Courts of Admiralty Act, 1890 ; Prize Courts Act, 1894.

(*d*) The student should be

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warned that the whole doctrine of so-called “ natural “ rights ” has been the subject of acute controversy since the days of Blackstone, from whom this passage is in substance taken.

(*e*) See *post*, pp. 645–646.

[mentioned, his qualified property, or, if dead, his absolute property ; so that to steal them, or otherwise invade his property therein, is, according to the nature of the case, sometimes a criminal offence, sometimes a civil injury.] But the right to take animals *feræ naturæ* is subject to many arbitrary restrictions and regulations imposed by the legislature, such as the restrictions and regulations contained in the Game Laws ; and the statutes severally passed for the protection of sea birds and certain other wild birds (*a*), of sand grouse (*b*), and of fresh-water fish (*c*), and shell fish generally (*d*). Inasmuch as the law of fisheries is too full of detail to be suitable for discussion in this treatise, we will here only discuss the laws relative to game.

[The Game Laws were, in early times, very stringent ; being based on the assumption that no one had a right to kill game, even on his own land, without royal permission, express or implied. And though the alleged monopoly of the Crown was gradually broken down, yet, even as late as the reign of Charles the Second, none were permitted to take or sell game unless duly qualified in respect of property, the ordinary qualification, as imposed by the Qualification Act, 1671 (22 & 23 Car. 2, c. 25), being the ownership of lands or tenements in possession, for an estate of inheritance of the yearly value of 100*l.*, or an ownership for life, or for ninety-nine years or upwards, of lands of the yearly value of 150*l.* This qualification was originally imposed chiefly for the preservation of the different species of game.]

The Game Act, 1831, repealed the Qualification Act of Charles the Second's reign, and provided, in sub-

(*a*) Wild Birds Protection Acts, 1880 to 1908.

(*b*) Sand Grouse Protection Act, 1888.

(*c*) Salmon and Freshwater Fisheries Acts, 1861 to 1907.

(*d*) Shell Fish Regulation Act, 1894.

stance, that the exclusive right to kill game upon any land should be vested *ratione soli* in the owners of such land, who may of course let or grant the right to others. But, by the same Act, as amended by the Game Licences Act, 1860, all persons killing, taking, or pursuing game, are required to take out a yearly excise licence, which stands in the place of the former 'game certificate'; and persons who (having no such licence) deal in game, are required to take out an excise licence for this latter purpose.

There are also many penal provisions, intended for the better preservation of game (a), and for the protection of landowners against *poaching* (whether by night or otherwise), and generally against unlawful trespasses in pursuit of game (b).

In the Game Act, 1831, 'game' is defined generally as including hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards (c); though the Game Licences Act, 1860, and the Poaching Prevention Act, 1862, are also directed to deer, woodcock, snipe, quail, landrail, and rabbits. As regards hares and rabbits, special provisions relative thereto are contained in the Hares Act, 1848, and the Game Licences Act, 1860. The short effect of these Acts is, that, in the absence of special agreement to the contrary, any occupier of inclosed lands (or any owner thereof with the right of killing game thereon) may kill hares on such land without an excise licence; and any one may pursue hares with greyhounds, beagles, or other hounds without an excise licence, subject of course to any question of trespass. And no licence need be obtained by one who is merely assisting another in

(a) Game Act, 1831; *Saunders v. Baldy* (1866) L. R. 1 Q. B. 87; *Guyver v. The Queen* (1889) 23 Q. B. D. 100.

(b) Night Poaching Acts,

1828 and 1844; Game Act, 1831, ss. 30 *et seq.*; Poaching Prevention Act, 1862.

(c) S. 13.



the pursuit of game which his employer is duly licensed to kill (a).

By the Ground Game Act, 1880, as amended by subsequent statutes (b), the right of the occupier, which includes an owner occupying his own land (c), to kill hares and rabbits, concurrently with the landowner or other person entitled under him to such game, is made a right inseparable from his occupation; and he cannot contract himself out of this concurrent right (d). But he may let his ordinary rights (not arising under the Act) to any third party (e); and a reservation of the exclusive right of sporting to the landlord is severable, so that, though void as to the ground game, it will be good as to winged game (f).

The various provisions of the Game Acts, the general effect of which has been in part above stated, do not interfere in any way with the rights of forest, park, chase, or warren (g); but it must be remembered that such persons as may lawfully hunt, fish, or fowl, *ratione privilegii*, have (as has been said) only a qualified property in such animals. Thus, if a man starts any such bird or beast on his own ground, and follows it into another's and kills it there, the property remains in himself (h). But if, being a trespasser, he starts it

(a) Game Licences Act, 1860, s. 5.

(b) Ground Game Act, 1906; Protection of Animals Act, 1911, s. 10.

(c) *Anderson v. Vicary* [1900] 2 Q. B. 287. See also *May v. Waters* [1910] 1 K. B. 431; *Waters v. Phillips* [1910] 2 K. B. 465.

(d) Ground Game Act, 1880, s. 3; *Sherrard v. Gascoigne* [1900] 2 Q. B. 279. Additional rights in the case

of moor lands are given by the Ground Game (Amendment) Act, 1906; but in respect of these rights certain contracts are authorised.

(e) *Morgan v. Jackson* [1895] 1 Q. B. 885.

(f) *Stanton v. Brown* [1900] 1 Q. B. 671.

(g) See *ante*, vol. i. pp. 281–284.

(h) *Sutton v. Moody* (1697) Lord Raym. 251; 2 Salk. 556; 3 Salk. 290.

on another man's land, and kills it there, the property belongs to him in whose ground it is killed (*a*) ; and this, even though the trespasser may have sold the dead game to a third person (*b*). And, again, if a stranger start game in one man's chase or free warren, and hunt it into another's liberty, the property continues in the owner of the chase or warren (*c*). But if a trespasser starts game on the land of A., whose right is *ratione soli* only and not *ratione privilegii*, and kills it upon the land of B., the property is in the trespasser, and not in either A. or B. (*d*). These distinctions seem to show, that although in general property is acquired by occupancy, yet the title by occupancy cannot prevail against the better claim either of him in whose grounds the animal is both started and killed (and who therefore may be said to be entitled *ratione soli*), or of him in whom, as having a right of free warren, there is already a qualified property in the game, *ratione privilegii*.

In conclusion upon this head, we may observe, that the person who has the right of shooting will be liable in a civil action for damages, should he cause damage to a person to whom he has leased the land, by overstocking it with game (*e*). A still further protection to occupiers of land in respect of game has been provided by the Agricultural Holdings Act, 1908 (*f*), which entitles a tenant to claim compensation from his landlord for damage exceeding one shilling an acre done to land which he holds, by game which he is not entitled to kill, *e.g.*, by deer, pheasants, partridges, grouse, and black game.

3. [A third species of title analogous to the right of

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| ( <i>a</i> ) <i>Sutton v. Moody</i> , <i>ubi sup.</i> | <i>sup.</i> ; <i>Churchward v. Studdy</i>   |
| ( <i>b</i> ) <i>Blades v. Higgs</i> (1866)            | (1811) 14 East, 249.                        |
| 11 H. L. C. 621.                                      | ( <i>e</i> ) <i>Farrer v. Nelson</i> (1885) |
| ( <i>c</i> ) <i>Sutton v. Moody</i> , <i>ubi sup.</i> | 15 Q. B. D. 258.                            |
| ( <i>d</i> ) <i>Sutton v. Moody</i> , <i>ubi</i>      | ( <i>f</i> ) S. 10.                         |

[occupancy, is the title by *accession*. According to the Roman law, if any corporeal object received an accession, whether by natural or by artificial means—as by the growth or planting of trees or vegetables, the pregnancy of animals, the embroidering of cloth, the conversion of metals into vessels and utensils, or by soldering a limb to a statue—the owner of the original or principal corporeal object remained the owner of it in such its altered or improved condition, as well as of its offspring or produce, even though separated from it (a). But if, by reason of any artificial operation, the original object was changed into a different species, not capable of being restored to the original form—as by making wine, oil, or bread out of another's grapes, olives, or wheat—this was called *specification*, and, in such a case, the original object became the property of the operator, who was only required to make a satisfaction to the original proprietor for the materials used (b). And these doctrines of the Roman law were implicitly adopted, and indeed copied, almost word for word, by our Bracton (c).

The few decisions of the English Courts have, as regards *accession*, followed the principles above laid down. For, with respect to accession by breeding from animals, in particular, it has been held, that the brood of all tame and domestic animals belongs to the owner of the dam or mother; the English law thus agreeing with the civil, that *partus sequitur ventrem* in the brute creation, though, for the most part, in the human species, it disallows that maxim. And therefore in the laws of England (d), as well as of Rome, “*si equam meam equus tuus prægnantem fecerit, non est tuum sed meum quod natum est*” (e). An exception to this rule obtains, however, in the case of swans; for

(a) Inst. 2, 1, 19, 25, 26, 31;  
Dig. 6, 1, 5, 2; *ibid.* 23, 5.

(b) Inst. 2, 1, 25.

(c) L. 2, ch. 2.

(d) Bro. Ab. *Propertie*, 29.

(e) Dig. 6, 1, 5, 2.

[the young cygnets belong equally to the respective owners of the cock and hen birds (a). But here the reasons of the general rule cease ; and, *cessante ratione legis cessat et ipsa lex*. For the male is well known by his constant association with the female ; and the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other. So too it is said, that if A. uses the materials of B. to embroider a coat, B. loses his property in his materials, and can sue only for damages (b).

But as regards what the Romans called *specificatio*, the English Courts have applied a different test from that of restoration to the original form ; namely, whether the original thing can be still recognised in its altered form. Thus, it has been held that grain made into malt has so far lost its identity as to be no longer recognisable ; and therefore the original owner loses his property therein, and can only sue for damages. But leather made into shoes, or trees cut into timber, still remain the property of the original owner (c).

4. A fourth species of title analogous to occupancy is the title by *confusion* ; being a title which arises where the goods of two persons become so intermixed that the several portions can be no longer distinguished. And here the English law partly agrees with, and partly differs from, the Roman. For the Roman law distinguished between *confusion* and *commixtion* ; applying the former term in the case of liquids and molten substances such as metals, the latter in the case of solid particles such as grains of corn. Again, in the latter case (but not in the former)

(a) *Case of Swans* (1592) 7 Rep. 17.

(b) *Anon.* (1595) Popham, 38.

(c) Y. B. 5 Hen. 7 (1490) p. 16 ; *Anon.* (1560) Moore, 20.

[a subtle distinction was drawn between a mixture by consent of the owners, and one without consent. But these distinctions related only to the forms of action ; and in practice each owner acquired an interest in common in the mixture, whether the case were one of confusion or of commixtion (a). But our law, rejecting these idle distinctions, asks only whether the goods which are intermixed can still be distinguished or not. Thus, the mixing of melted tallow, or of hay or coins, are alike treated as cases of confusion (b) ; and the like rule is applied where bales of goods belonging to different owners have become unidentifiable owing to the obliteration of marks (c). But where articles of furniture are thrown together, since they can still be distinguished, there is no confusion, and no alteration of property (d). And in cases which do amount to confusion, our common law applies a severe rule to him who wilfully intermixes his property with that of another ; giving, in such a case, the entire property, apparently without account, to the other, whose original dominion is invaded without his own consent (e).]. When, however, the intermixture takes place accidentally or by agreement, it would seem that the original owners have an interest in common in the mixture in proportion to their respective shares (f), or otherwise in accordance with their agreement. And even in cases where the confusion is due to the fault of one party, if the quality of the articles is uniform, and the original quantities are known (as in the case of 500*l.* of trust money mixed with 300*l.* of the trustee's

(a) Inst. 2, 1, 27, 28.

Hannay [1894] A. C. 494.

(b) *Ward v. Ayre* (1615) Cro. Jac. 366 and 2 Bulst. 323 ; *Buckley v. Gross* (1863) 3 B. & S. 566.(d) *Colwill v. Reeves* (1810) 2 Camp. 576.(c) *Spence v. Union Marine Insurance Co.* (1868) L. R. 3 C. P. 427 ; *Smurthwaite v.*(e) *Anon.* (1595) Popham, 38 ; *Ward v. Ayre*, *ubi sup.*(f) *Buckley v. Gross*, *ubi sup.*

own money), equity will permit the party by whose act the confusion took place to claim his proper quantity ; subject only to the quantity of the other proprietor being first made good out of the whole mass (*a*).

(*a*) *Lupton v. White* (1809) 15 Ves. 442 ; *Re Hallett's Estate* (1880) 13 Ch. D. 696 ; *Mutton v. Peat* [1899] 2 Ch. 556 ; [1900] 2 Ch. 79.

## CHAPTER III.

## OF TITLE BY INVENTION.

WE come now to the title by INVENTION, which includes patent rights, copyrights, and rights to trade marks and designs ; all of which four classes or species of rights may with propriety be considered together, within the compass of the same chapter.

## I.—PATENT RIGHTS.

By a ‘ patent right ’ is meant a privilege granted by the Crown to the first inventor of any manner of new manufacture, enabling the grantee to prevent all other persons from making, using, exercising, or vending, during a limited period, the subject-matter of the invention. The right is so called, because the instrument by which it is bestowed has always been in the form of letters patent. To confer, indeed, on any individual the exclusive right of carrying on a particular trade or manufacture, is, in general, beyond the lawful bounds of the royal prerogative ; for such a grant amounted, at the common law, to a monopoly (*a*), and, by the Statute of Monopolies of 1623 (21 Jac. 1, c. 3), was declared to be “ altogether contrary to the laws of “ this realm.” But an exception was made in favour of inventors of manufactures ‘ new within the realm ’ ; because, with regard to them, grants of exclusive privileges for a reasonable period, while they tended to encourage useful ingenuity, encroached on no

(*a*) 3 Inst. 181.

right of which other subjects were already in possession (*a*). In accordance, therefore, with this exception of the common law, the Statute of Monopolies excepts, from its general operation, all letters patent for the term of fourteen years or under, by which the privilege of sole working or making any manner of new manufactures within this realm, which others at the time of granting the letters patent shall not use, shall be granted to the true and first inventor thereof, “so as “they be not contrary to law, nor mischievous to the “State, nor generally inconvenient.”

Since that statute, no patent right has been valid unless it falls within the terms of the exception above referred to (*b*) ; and, accordingly, no patent right can be legally granted (at least in the first instance) for any period longer than fourteen years, while the subject of every patent must be a “manner of *new* manufacture “within this realm.” The importance of this definition is so great that we shall do well to analyse its requirements with some degree of minuteness.

First, the subject-matter of a patent must be a *manufacture*, which, broadly stated, means some fabricated article, or the means of making such an article. But a patent may be taken out not only for an entire article, but also for an addition, by way of improvement, to one already existing, or for a chemical or other process of production (*c*), even though it consists in a novel application of an old thing (*d*).

Second, the manufacture must also be *new*. A patent, therefore, granted for an article already used, or known, or communicated to the public in this country, whether the prior use or discovery be known

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| (a) 3 Inst. 184 ; <i>Darcy v. Levinstein</i> (1887) L. R. 12 |  |
| <i>Allein</i> (1602) 11 Rep. 84 b.                           | App. Ca. 710.  |
| (b) <i>Boulton v. Bull</i> (1795) 2                          | (d) <i>Crane v. Price</i> (1842) 4                               |
| H. Bl. 486.  | Man. & G. 580 ; <i>Gadd v. Manchester</i> (1892) 9 R. P. C. 516. |
| (c) <i>Badische Anilin v.</i>                                |  |



to the patentee or not, is void (a). But it is sufficient that it be new *within this realm* at the time when the patent is granted ; the previous notoriety of the article, in a foreign country, or even in the British Colonies, being no objection to the validity of the patent (b). A thing or process is not 'new,' in the sense referred to, if it has been already published in this country by means of prior user, or in books or documents, or disclosed to particular individuals not bound to secrecy. But by the Patents and Designs Act, 1907 (c), the exhibition of an invention at an industrial or international exhibition, officially recognised, will not prejudice the inventor ; provided that he gives previous notice to the Patent Office of his intention to exhibit, and within six months thereafter makes due application for his patent. And, by the same Act (d), it is provided (i) that the deposit of a specification more than fifty years old, or of a provisional specification of any date, shall not be deemed to anticipate an invention, and (ii) that a patent shall not be deemed to be invalid by reason of a prior publication, if the patentee proves that such publication was without his knowledge or consent, that the matter published was derived from him, and that he has not been guilty of delay in applying for the patent, after learning of the publication.

Thirdly, it is now established, that a patentable thing or process must involve some invention or ingenuity, and must possess the characteristic of *utility*, i.e., for the purpose indicated by the patentee (e).

Fourthly, the applicant, or one of the applicants,

(a) 3 Inst. 184 ; *Hill v. Evans* (1818) 8 Taunt. 401 ; *Patterson v. Gas Light and Coke Co.* (1875) L. R. 3 App. Ca. 239.

(b) *Rolls v. Isaacs* (1881) 19 Ch. D. 268.

(c) S. 45.

(d) S. 11.

(e) *Dowling v. Billington* (1890) 7 R. P. C. 191 ; *Lane-Fox v. Kensington Co.* [1892] 3 Ch. 424 ; *Welsbach Co. v. New Incandescent, &c. Co.* [1900] 1 Ch. 843.

for the patent must be the *true and first inventor*. The word ‘inventor’ implies some exertion of ingenuity, and supposes some difficulty surmounted; so that when the new manufacture is of an obvious character, requiring no skill or contrivance for its production, it is not the fit subject-matter of a patent. And no one can claim the character of *true and first inventor* if it appear that the novelty in question was first suggested to him by some other person in this country (*a*); but where the secret is acquired abroad by one who afterwards introduces it into this realm, he is considered (for the purpose now under consideration) as the true and first inventor. For it was considered immaterial whether the benefit bestowed on the public was the result of a man’s travel and observation, or the fruit of his original genius (*b*).

Modern conditions have, however, rendered unreasonable this liberty of appropriating foreign inventions; and it has therefore been considerably restricted. For by the Patents Act, 1907 (*c*) (re-enacting earlier enactments), it is provided that if His Majesty is pleased to make any arrangement with the Government of any foreign state for mutual protection of inventions, any person who has applied for protection for any invention in that state shall be entitled to a patent in this country for his invention in priority to other applicants, and that the patent shall have the same date as the date of application in the foreign state. The application must be made within twelve months from the application for protection in the foreign state; but the patent so granted is not to be invalidated by reason only of the publication of a description, or use of the invention, in this country during such twelve months.

( <i>a</i> ) <i>Marsden v. Saville Street</i>	( <i>b</i> ) <i>Harris v. Rothwell</i> (1887)
<i>Co.</i> (1878) 3 Ex. D. 203; <i>Re</i>	35 Ch. D. 416.
<i>Ralston’s Patent</i> (1909) 100	( <i>c</i> ) S. 91.
L. T. 386.	

In the case of two simultaneous discoverers, he who first procures a patent, before the matter is made public, is entitled to enjoy the exclusive privilege it confers. If a person possessed of an invention, of which he is the true and first inventor, dies without making application for a patent, his legal representative may apply for a patent for such invention; and a patent may accordingly be granted to him (a).

We must now consider the chief legal questions which arise in connection with patents; but the subject is so vast that only a few words can be said with regard to those of most interest to lawyers. We shall therefore deal briefly with (i.) the procedure for obtaining letters patent, (ii.) the assignments of patents and the granting of licences to use patented inventions, (iii.) the extension of patent rights beyond the term for which they were originally granted, (iv.) the remedies for infringement, (v.) the revocation of patents, and (vi.) some miscellaneous points arising on the subject.

(i) *Procedure for obtaining letters patent.*—The grant of a patent right is not *ex debito justitiæ*, but is an act of royal favour; though in a fit case it is never refused. The mode of proceeding to obtain it is now regulated by the Patents and Designs Act, 1907, an Act passed to consolidate many previous statutes, and is, in general, as follows.

The applicant may be a British subject or a foreigner; and one or more persons may be joint applicants. The application must be in the prescribed form, and must contain a declaration that the applicant, or one of the applicants, is the true and first inventor (b). The application, which must be left at, or sent to, the Patent

(a) Patents and Designs Act, 1907, s. 43. (It is not now necessary that the application should be made within six months of the death.)  
(b) Act of 1907, s. 1.

Office (a), must be accompanied by either a provisional or a complete specification (b). A provisional specification describes generally the nature of the invention ; while the complete specification particularly describes and ascertains in detail its nature, and the manner in which it is to be performed or put in use (c). The complete specification, if not left with the application, must be sent not later than six months (or, by leave, seven months) from the date of the application ; otherwise the application is taken to have been abandoned (d).

The application is referred, by the Comptroller of Patents, to an examiner ; and the examiner reports thereon (e)—first, whether the invention is fairly described ; second, whether the application, with the accompanying specification and drawings, is in proper form ; third, whether the title sufficiently indicates the subject-matter of the invention ; fourth (when a complete specification is left after a provisional one), whether the invention described in that specification agrees with that in the provisional one ; and fifth, whether the invention claimed has been wholly or in part described in any previous specification during the preceding fifty years (f). If the report on the first three heads is in the affirmative, then the *application* is accepted by the Comptroller, who thereupon gives notice of its acceptance to the applicant. After such acceptance, the inventor enjoys, during the interval between the date of the application and the date of sealing the patent, the right to use his process without prejudice to the patent thereafter to be granted ; this immunity of enjoyment being known as his ‘provisional protection’ (g). And in the case of a com-

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|-----------------------------------|----------------------------|
| (a) Act of 1907, s. 1,            | supplied.)                 |
| sub-s. (1).                       | (d) <i>Ibid.</i> s. 5.     |
| (b) <i>Ibid.</i> sub-s. (3).      | (e) <i>Ibid.</i> s. 3.     |
| (c) <i>Ibid.</i> s. 2. (The Comp- | (f) <i>Ibid.</i> ss. 6, 7. |
| troller may require suitable      | (g) <i>Ibid.</i>           |
| drawings and samples to be        |                            |

plete specification, if the reports on the fourth and fifth heads are also favourable to the applicant, the Comptroller accepts the *specification*. Thereupon the applicant has, during the interval between the acceptance of the specification and the date of sealing the patent, the like rights as if the patent had been already granted; except that he has no right of action for an infringement, unless and until the patent is in fact granted (*a*).

So soon as the complete specification has been accepted, the Comptroller advertises its acceptance; and the application, specification, and drawings are open to inspection at the Patent Office (*b*). Within two months after the advertisement, any person may give notice at the Patent Office of opposition to the grant of the patent (*c*), on any of the following (and no other) grounds:—(1) that the applicant has obtained the invention from him, or from a person of whom he is the legal representative; (2) that the invention has been claimed in a complete specification for a British patent of prior date; (3) that the nature of the invention, or the manner in which it is to be performed, is not sufficiently or fairly described; (4) that the complete specification comprises an invention other than that described in the provisional specification, and that such other invention forms the subject of a pending application made by the opponent.

If notice of opposition is given, the Comptroller gives notice thereof to the applicant; and after the expiration of the two months, and after hearing the applicant and his opponent or opponents, the Comptroller decides on the case, with an appeal to the Law Officer (*d*). On such appeal, the Law Officer hears the

(*a*) Act of 1907, s. 10; *Ex parte Bates and Redgate* (1869) L.R. 4 Ch. App. 578; *Ex parte Henry* (1873) L. R. 8 Ch. App. 167.

(*b*) Act of 1907, s. 9.

(*c*) *Ibid.* s. 11.

(*d*) *I.e.*, the Attorney-General or Solicitor-General (Act of 1907, s. 93).

parties, and (with or without the assistance of an expert) determines whether the patent shall be granted or not (*a*). If, however, there is no opposition, or, in case of opposition, if the determination is in favour of the grant of a patent, then the Comptroller causes a patent to be sealed with the seal of the Patent Office (*b*), which has the same effect as if it were sealed with the Great Seal of the United Kingdom. The grant is then recorded in the register of patents at the Patent Office.

The object of the complete specification is, of course, to put the public in full possession of the inventor's secret; so that any person may be in a condition to avail himself of it, when the period of exclusive privilege has expired. To prevent this object from being defeated by an evasive or careless description, the specification is construed with great strictness by the Courts. In describing the nature of the invention, the specification, whether provisional or complete, must commence with the title of the patent; and, in the case of a complete specification, must end with a distinct statement of the invention claimed (*c*). The office of the complete specification being to set forth, with more particularity, the subject indicated in the provisional specification or in the patent itself, if one thing be claimed by the patent and another by the specification, the grant is void (*d*). It is also an objection to the specification, that it covers too much; that is, includes, in its claim of new invention, anything which in fact has been already known and practised. And therefore, if the entire article for which the patent is being taken out comprises some matter of this description, in connection with others that are

(*a*) Act of 1907, s. 11.

Ca. 496.

(*b*) *Ibid.* ss. 12, 14.

(*d*) *Nuttall v. Hargreaves*

(*c*) *Ibid.* s. 2 (4); *Siddell v. Vickers* (1890) L. R. 15 App.

[1892] 1 Ch. 23.

new, the claim ought to be made in such form as to apply to the latter only ; or, if the combination of several known things happens to be the only novelty, it is to the *combination* only that the claim should be directed (a).

As regards the description of the manner of production, the general rule is : that the specification should enable persons of ordinary skill to make the patent article, by simply following the directions given, without resorting to contrivances of their own (b). In framing the specification, no circumstance may be safely passed over which is advantageous, whether absolutely essential or not, in the conduct of the process ; and if several methods are stated, the specification will be defective and the patent void, if *any* of them be found to fail in effecting the promised result (c).

By the letters patent (which are to be sealed as soon as may be, and, in general, not after the expiration of fifteen months from the date of the application) there is granted to the applicant the exclusive right of making, using, exercising, and vending his invention within the United Kingdom and the Isle of Man, for the full term of fourteen years, subject to the patentee making the prescribed payments (d). But it has been held that 'vending' does not include the making of a contract of sale in respect of goods which are in a foreign country, and are to be delivered to the purchaser in a foreign country (e). A patent ceases if the patentee fails to make the prescribed payments (f) ; but if the failure has been unintentional, and application for its restoration is made without undue delay, the

(a) *Pneumatic Tyre Co. v. Caswell* (1897) 13 R. P. C. 164.

(b) *Miller v. Searle & Co.* (1893) 10 R. P. C. 106.

(c) *Siddell v. Vickers* (1890) L. R. 15 App. Ca. 496.

(d) Act of 1907, ss. 14, 17.

(e) *Saccharin Corporation v. Reitmeyer* [1900] 2 Ch. 659 ; *Badische Anilin, &c. v. Hickson* [1906] A. C. 419.

(f) Act of 1907, s. 17.

Comptroller, subject to an appeal to the Court, may restore the patent (*a*).

Patent rights hold good against the Crown (*b*), at least *quodam modo*; that is to say, the Crown may still use the patent, but paying therefor what shall be agreed, or (failing agreement) what the Treasury shall appoint (*c*).

(ii) *Assignment of patents and licences*.—A patent right is *assignable* either absolutely or by way of mortgage (*d*); and the assignment may be of part even of the patent, or may be for some specified place or country only (*e*). But in every case, the assignment, to pass the legal interest, must be in writing under hand and seal; though an equitable assignment is effectual without a deed, and capable of being entered on the register (*f*). It is also competent to the patentee, without an entire alienation of his interests, to grant *licences* to any one or more persons, to manufacture, use, or sell the subject-matter of the patent; and, for the due working of the invention, he may (by an order of the High Court of Justice, made on a reference to it by the Board of Trade of a petition presented by any person interested) even be compelled to grant such licences (*g*). Every assignment, and also every licence, is to be registered at the Patent Office in the register of patents (*h*). The person registered as proprietor has, subject to any other rights appearing on the register, the power to make assignments and grant licences in respect of the patent

(*a*) Act of 1907, s. 20; *Re Land's Patent* [1910] 2 Ch. 236.

(*b*) Act of 1907, s. 29; *Feather v. The Queen* (1865) 6 B. & S. 257.

(*c*) *Nobel's Explosives v. Anderson* (1896) 12 R. P. C. 164.

(*d*) *Steers v. Rogers* [1893] A. C. 232.

(*e*) Act of 1907, s. 14.

(*f*) *Re Casey's Patents* [1892] 1 Ch. 104.

(*g*) Act of 1907, s. 24.

(*h*) *Ibid.* s. 28.



and otherwise to deal with it (*a*), and has the right to sue in respect of it (*b*); but equities in respect of the patent may be enforced in like manner as in respect of other personal property (*c*).

In general, the sale of a patented article is deemed to include a licence to the purchaser, and to every subsequent purchaser, of the article to use and sell the article as he pleases; but this licence may be subject to conditions expressed at the time of the sale, and such conditions will bind every subsequent purchaser who takes with notice of them (*d*). But a sub-purchaser of an article alleged to be patented, sold with such a limited licence, is not bound to accept the position of licensee, and is, therefore, not estopped from denying the validity of the patent. And therefore, if the patent is held to be invalid, he will not be bound by such conditions (*e*). And, with certain exceptions, it is not lawful to insert in any contract for the sale or lease of, or licence to use or work, any patented article or process, any condition prohibiting the purchaser, lessee, or licensee, from using any article or patented process not supplied or owned by the seller, lessor, or licensor, or his nominees, or requiring the purchaser, seller, or licensee to acquire from the seller, lessor, or licensor, any article not protected by the patent (*f*).

(iii) *Extension of patents*.—Formerly, in favour of a patentee who had not reaped the full benefit of his invention, the legislature frequently interfered, by passing a private Act of Parliament, to secure him the continuance of the privilege for a further term of

(*a*) Act of 1907, s. 71.

(*b*) *Duncan v. Lockerbie*  
(1912) 29 R. P. C. 454; 56  
S. J. 573.

(*c*) Act of 1907, s. 71.

(*d*) *Incandescent Light Co.*  
*v. Cantelo* (1895) 12 R. P. C.

262; *National Phonograph Co.*  
*of Australia v. Menck* [1911]  
A. C. 336.

(*e*) *Gillette Safety Razor Co.*  
*v. A. W. Gamage, Ltd.* (1909)  
25 T. L. R. 808.

(*f*) Act of 1907, s. 38.

years, in addition to that first limited by the letters patent. Subsequently, for a private Act of Parliament, was substituted a petition to the Crown, which was referred for consideration to the Judicial Committee of the Privy Council. But now the grantee may, under such circumstances, apply by petition to the High Court for a prolongation of the existing term; his intention to do so being first duly advertised, and the petition being actually presented six calendar months, at least, before the expiration of the original term (a). If, after consideration of the nature and merits of the invention in relation to the public, of the profits made by the patentee as such, and of the whole matter, and after hearing any party who has given notice of objection (b), as well as the petitioner and the Comptroller (c), it appears to the Court that the patentee has been inadequately remunerated, the Court may by order extend the term of the patent for a further term not exceeding seven years, or (in exceptional cases) fourteen years, or may order the grant of a new patent for the term therein mentioned, containing any restrictions, conditions, and provisions that the Court may think fit (d). Such new patent may be granted in respect of part only of the invention claimed in the original patent (e). A second extension cannot be granted by the Court (f).

(iv) *Remedies for infringement.*—If a patent right be infringed, the inventor has his remedy by action to recover damages for the injuries sustained, or, alternatively, to obtain an account of profits derived from such

(a) Act of 1907, s. 18 (1);  
*Re Henderson's Patent* [1901]  
 A. C. 616.

(b) Act of 1907, s. 18 (2);  
*Re Johnson's Patent* [1908]  
 2 Ch. 487; [1909] 1 Ch. 114.

(c) Act of 1907, s. 18 (3).

(d) *Ibid.* s. 18 (5).

(e) *Re Lodge's Patent* [1911]  
 2 Ch. 46.

(f) *Re Thompson's Patent*  
 [1909] 2 Ch. 447.

infringement, and an order for payment of what may appear due. In such action he must deliver (with his statement of claim) a document called Particulars of the Breaches (a). He may also in such action obtain an injunction restraining the wrongdoer from the further use of the invention, and compelling him to account for the profits which he may have already derived therefrom (b). Such injunction may be granted against an infringer, even though he was unaware of the existence of the patent; but no *damages* can be recovered against a defendant who was unaware, and had no reasonable means of making himself aware, of the patent (c). A successful plaintiff in such an action may also obtain an order for the delivery to him or destruction of infringing articles; unless such order would be unreasonable (d). The defendant in any such action may, of course, defend it, either on the ground that no infringement has taken place, or on the ground that the patent is invalid. In the latter event he must, with his statement of defence, deliver particulars of his objections to the patent (e); and the invalidity of the patent may be established by showing, that the article was not a fit subject for a patent, or else that the patentee was not the first inventor, or that the specification was insufficient.

(v) *Revocation of patents*.—Nor is this the only method of defeating claims founded on an alleged patent

(a) R. S. C., O. LIII.A, r. 13; *De Vitre v. Betts* (1873) L. R. 6 H. L. 319; *British Motor Syndicate v. Taylor* [1901] 1 Ch. 122.

(b) Act of 1907, s. 34.

(c) *Ibid.* s. 33.

(d) *Vavasseur v. Krupp* (1878) 9 Ch. D. 351; *United Telephone Co. v. London and*

*Globe Telephone and Maintenance Co.* (1884) 26 Ch. D. 766; *British Westinghouse Electric and Manufacturing Co. v. Electrical Co.* (1911) 28 R. P. C. 517.

(e) O. LIII.A, r. 13; *Crompton v. Anglo-American Brush Co.* (1887) 35 Ch. D. 283.

right; for, whether there was any complaint of infringement or not, it used to be competent to the Crown (or to any subject of the realm in the name of the Crown, by leave of the Attorney-General) to institute a proceeding called a *scire facias* for the formal impeachment of the patent; and by the effect of this (if found open to any of the objections above enumerated, or to any other sufficient exception in point of law), the patent would have been cancelled (*a*). But the proceeding by *scire facias* to repeal a patent is now abolished; and revocation of a patent is now obtainable on petition to the Court, the petition being presented either by the Attorney-General, or by any one authorised by him, or by any aggrieved person (*b*).

A patent may now be revoked, not only on any ground on which it might formerly have been revoked by *scire facias*, or as an alternative to the grant of a compulsory licence, but also on the ground that the patent is being worked exclusively or mainly outside the United Kingdom; unless satisfactory reasons are given why it is not being worked to an adequate extent within the United Kingdom (*c*). The Comptroller has also power to revoke patents in certain cases (*d*).

(vi) *Miscellaneous points*.—The following important provisions of the Act of 1907 should also be borne in mind. First, the applicant or patentee, by request in writing left at the Patent Office, may obtain leave to amend his specification, by way of disclaimer, correction, or explanation; and the amendment may be allowed with or without terms. The request, and the nature of the proposed amendment, must be advertised;

(*a*) *Smith v. Upton* (1844) 217; *Re Fiat Motor Co.'s Patent* [1911] 1 Ch. 66; *Re Taylor's Patent* [1912] 1 Ch. 635; *Re Green's Patent*, *ibid.* 754.

(*b*) Act of 1907, s. 25 (3).

(*c*) *Ibid.* s. 27; *Re Hatschek's Patent* [1909] 2 Ch. 68; *Re Bremer's Patent*, *ibid.*

(*d*) Act of 1907, s. 26.

and any person may give notice of opposition to the amendment. After hearing the opponent (if any) the Comptroller, subject to an appeal to the Law Officer, must determine whether, and subject to what conditions (if any), the amendment ought to be allowed (*a*). This procedure for amendment is not available when any action for infringement or proceeding for revocation is pending; but, in such a case, the patentee may be allowed by the Court to amend his specification by way of disclaimer (but not of correction or explanation), subject to such terms as to costs, advertisement, or otherwise, as the Court may think fit (*b*). In either case, no amendment is allowable which would make the specification as amended claim an invention substantially larger than, or substantially different from, the invention claimed by the specification as it stood before amendment (*c*); and no damages will be given in any action in respect of the use of the invention prior to the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge (*d*).

Secondly, if, in any action for infringement, the Court has certified that the validity of the patent came in question, then, in any subsequent action for infringement, the plaintiff, on obtaining judgment in his favour, may have his full costs, charges, and expenses as between solicitor and client (*e*).

Thirdly, if a patent is lost or destroyed, a duplicate thereof may be sealed (*f*).

(*a*) Act of 1907, s. 21.

(*c*) Act of 1907, ss. 21, 22.

(*b*) *Ibid.* s. 22. As to the conditions which the Court will impose, see *Re Klüber and Steinberg's Patent* [1908] 1 Ch. 847; *Gillette Safety Razor Co. v. Luna Safety Razor Co.* [1910] 2 Ch. 373.

(*d*) *Ibid.* s. 23; *Stepney Spare Motor Wheel Co. v. Hall* [1911] 1 Ch. 514; 28 R. P. C. 381.

(*e*) Act of 1907, s. 35.

(*f*) *Ibid.* s. 44.

Fourthly, for the protection of the public, the Patents and Designs Act provides, that if a person claiming to be a patentee, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of alleged infringement of the patent, any person aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, with or without damages, if the alleged infringement was not in fact an infringement of any legal rights of the person making such threats. *Bona fides* is no defence to such an action for threats; but the action does not lie if the person making the threats with due diligence commences and prosecutes an action for infringement of his patent (a).

## II.—COPYRIGHT.

The Law of Copyright is now governed mainly by the Copyright Act, 1911; and the great majority of the earlier statutes on the subject are repealed by that Act. The term 'copyright,' as used in that Act, includes not only the exclusive right of making copies, but also rights of delivery (in the case of lectures), and of performance (in the case of musical and dramatic works); and the right extends (subject to the provisions of the Act) to every original literary, dramatic, musical, and artistic work. Before the date when this Act came into operation in the United Kingdom (July 1st, 1912) the law was to be found mainly in a large number of statutes which dealt separately with different kinds of right and different kinds of work. Where any person was immediately before the commencement of the Act of 1911 entitled to any right in the nature of

(a) Act of 1907, s. 36; 248; *Metropolitan Gas Meters Skinner v. Shew* [1893] 1 Ch. 413; [1894] 2 Ch. 581; *Craig v. Dowding* (1908) 24 T. L. R. 515; *British, Foreign and Colonial Automatic Light Controlling Co.* (1912) 29 R. P. C. 680.

copyright or performing right (either under the earlier statutes or by the common law) in any work, the Act, subject to certain exceptions and modifications and adjustments, substitutes for such right copyright as defined by the Act (*a*). The older law of copyright has, therefore, now become comparatively unimportant; and, as the subject is difficult, we will proceed at once to analysis of the provisions of the new Act.

#### COPYRIGHT UNDER THE ACT OF 1911.

*Subject-matter of the right.*—Under the Act “every original, literary, dramatic, musical, and artistic work,” may be the subject of copyright (*b*). These words are not defined by the Act; but the interpretation section (*c*) states in some detail matters which are included in some of them. Thus, for example, ‘literary work’ includes maps, charts, plans, tables and compilations; ‘dramatic work’ includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement, or acting form, or the combination of incidents represented, gives the work an original character; ‘artistic work’ includes works of painting, drawing, sculpture, and artistic craftsmanship and architectural works of art and engravings and photographs; and the words ‘work of sculpture,’ ‘architectural work of art,’ ‘engravings,’ ‘photograph’ and ‘cinematograph’ are further explained at some length (*d*).

Under the earlier Acts, a number of decisions were given as to what is capable of copyright; and it is presumed that, so far as they are not inconsistent with the new enactment, or dependent upon the wording

(*a*) Act of 1911, s. 24 and  
1st Schedule.

(*b*) Act of 1911, s. 1.

(*c*) *Ibid.* s. 35.

(*d*) *Ibid.* s. 35.

of the previous statutes, these decisions will be followed. It is conceived that the following principles still hold good.

(1) No copyright can be claimed in any production which is immoral, blasphemous, or seditious in its tendency, or which is defamatory of private character (*a*), or which (with a view to defraud the public) is published as the work of one who is not in truth the author, or is otherwise fraudulent (*b*).

(2) Copyright cannot exist in the mere title of a book, at any rate unless there is some degree of originality in the title; though a right to such title may arise by time and use (but not by mere registration), on the principle to be pointed out hereafter in dealing with trade marks and trade names (*c*).

(3) There is no copyright in a mere piece of information, or statement of opinion or theory, apart from the literary form in which it is expressed (*d*); though there is a right at common law to restrain the publication, in breach of faith, of unpublished information (*e*). But there may be a copyright in such things as directories or books of time tables; if there is any originality in the headings or the arrangement (*f*).

The Act of 1911 does not apply to designs capable of being registered under the Patents and Designs

(*a*) *Walcot v. Walker* (1802) 7 Ves. 1; *Lawrence v. Smith* (1822) Jac. 472.

(*b*) *Wright v. Tallis* (1845) 1 C. B. 893; *Slingsby v. Bradford & Co.* [1906] W. N. 122.

(*c*) *Dicks v. Yates* (1881) 18 Ch. D. 76; *Schove v. Schmincke* (1886) 33 Ch. D. 546; *Licensed Victuallers' Newspaper Co. v. Bingham* (1888) 38 Ch. D. 139; overruling *Weldon v. Dicks* (1879)

10 Ch. D. 247.

(*d*) *Pike v. Nicholas* (1869) L. R. 5 Ch. App. 251; *Walter v. Steinkopf* [1892] 3 Ch. 489; *Chilton's Case* [1895] 2 Ch. 29.

(*e*) *Exchange Co. v. Gregory* [1896] 1 Q. B. 147; *Exchange Co. v. Central News* [1897] 2 Ch. 48.

(*f*) *Lamb v. Evans* [1893] 1 Ch. 218; *Leslie v. Young* [1894] A. C. 335.



Act, 1907 ; except to designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process (a).

*Nature of the right.*—For the purposes of the Act ‘copyright’ means the sole right to produce or reproduce the work, or any substantial part thereof, in any material form whatsoever ; to perform or, in the case of a lecture, to deliver, the work or any substantial part thereof in public ; and, if the work is unpublished, to publish it or any substantial part thereof. It includes corresponding rights with regard to the translation of the work ; the conversion of a dramatic work into a novel or other non-dramatic work, and *vice-versâ* ; and the making of a record, perforated roll, cinematograph film or other contrivance, by means of which a literary, dramatic, or musical work may be mechanically performed or delivered (b).

*Acquisition of the right.*—Copyright may subsist either in published or in unpublished works. For the purposes of the Act ‘publication’ means the issue of copies of the work to the public, but does not include public performance or delivery of a dramatic or musical work or of a lecture, public exhibition of an artistic work, or the construction of an architectural work. The issue of photographs and engravings of works of sculpture and architectural works of art is not to be deemed publication of such works (c).

In the case of a published work, copyright is acquired if the work was first published in any part of His Majesty’s dominions to which the Act extends ; in the case of an unpublished work, if the author was at the date of making the work a British subject, or resident within any such part of His Majesty’s

(a) Act of 1911, s. 22 ; see  
*post*, pp. 64–67.

(b) Act of 1911, s. 1 (2).

(c) *Ibid.* s. 1 (3).

dominions (a). The right is not acquired in respect of any other works, except in so far as the protection conferred by the Act is extended by Orders in Council to self-governing dominions to which the Act does not extend, and to foreign countries (b). It is clear now that, in the case of published works, copyright may be acquired by an author who is neither a British subject nor resident within the British dominions. First publication is to include a publication which is simultaneous with a publication outside the limits to which the Act extends, unless the publication within the limits was merely colourable and not intended to satisfy the reasonable requirements of the public; and publications in two places are to be deemed simultaneous if the interval between them does not exceed fourteen days, or such longer period as may be fixed by Order in Council (c).

*Term of copyright.*—The normal term of copyright is the life of the author and a period of fifty years after his death (d). In the case of joint authorship, the term is the life of the author who dies first, together with a period of fifty years after his death, or the life of the author who dies last; whichever period is the longer (e). A work of joint authorship is one produced by the collaboration of two or more authors, in which the contribution of one author is not distinct from the contribution of the other author or authors (f).

In the case of a work in which copyright subsists at the author's death, but which has not been published during his lifetime, the copyright subsists until publication and for a term of fifty years thereafter (g).

(a) Act of 1907, s. 1 (1). The old so-called 'common law right' of the proprietor of an unpublished work to restrain its publication is now abolished, or, rather, absorbed in the copyright created by

the new Act (s. 31).

(b) Act of 1911, s. 1 (1).

(c) *Ibid.* s. 35 (3).

(d) *Ibid.* s. 3.

(e) *Ibid.* s. 16 (1).

(f) *Ibid.* s. 16 (3).

(g) *Ibid.* s. 17 (1).

This provision applies only to literary, dramatic and musical works, and to engravings ; and, in the case of dramatic and musical works and lectures, public performances or delivery are for this purpose equivalent to publication (a). In the case of joint authorship, the provision applies to works in which copyright subsists at the death of the author who dies last, but which have not been published, performed, or delivered, before that date (b).

Copyright in records, perforated rolls, and other contrivances for the mechanical reproduction of sounds, subsists for fifty years from the date of the making of the original plate from which the contrivance was derived (c) ; and the copyright in photographs subsists for fifty years from the making of the original negative (d). Where any work has, before or after the commencement of the Act, been prepared or published by or under the direction or control of the Crown or any Government department, the copyright, subject to any agreement with the author, belongs to the Crown ; and, in such case, the term of copyright is fifty years from the first publication. This provision is without prejudice to any rights or privileges of the Crown (e).

*First ownership of copyright.*—In general, the ownership of the copyright belongs, in the first instance, to the author of the work (f). The Act makes no provision as to the general nature of the interest of joint authors in a joint work ; but it would seem probable, that their interest partakes of the nature of tenancy in common, at least so far that on the death of one his interest passes to his legal personal representatives. But it is difficult to see how one joint author could be allowed to deal with the copyright

(a) Act of 1911, s. 17 (1).

(b) *Ibid.* s. 17 (1).

(c) *Ibid.* s. 19 (1).

(d) *Ibid.* s. 21.

(e) *Ibid.* s. 18.

(f) *Ibid.* s. 5 (1).

or any part of it without the consent of the other or others, or to claim anything in the nature of a partition (a). Where one or more of the joint authors do not satisfy the conditions conferring copyright under the Act, the work is to be treated, except for the purpose of ascertaining the term of copyright, as if the other or others were the sole author or authors (b). Where a married woman and her husband are joint authors, the interest of the married woman is her separate property (c).

In the case of records, perforated rolls, and similar contrivances for the mechanical production of sounds, the owner of the original plate at the time when it was made (d), and, in the case of a photograph, the owner of the original negative at the time when it was made (e), is to be deemed the author; and, in either case, if such owner is a body corporate, such body corporate is to be deemed for the purposes of the Act to reside within the parts of His Majesty's dominions to which the Act extends, if it has established a place of business within such parts (f).

The ownership of a deceased author's manuscript of an unpublished work, if acquired under his testamentary disposition, is *prima facie* (but not conclusive) proof of the copyright being in the owner of the manuscript (g).

In the case of an engraving, photograph, or portrait, where the plate or other original was ordered by some person other than the author, and was made for valuable consideration in pursuance of that order, then, in the absence of agreement to the contrary, the

(a) See *Powell v. Head* (1879) 12 Ch. D. 686; *Lauri v. Renad* [1892] 2 Ch. 402; and Robertson, *Law of Copyright*, 74.

(b) Act of 1911, s. 16 (2).

(c) *Ibid.* s. 16 (3).

(d) *Ibid.* s. 19 (1).

(e) *Ibid.* s. 21.

(f) *Ibid.* ss. 19 (1), 21.

(g), *Ibid.* s. 17 (2).

person by whom such plate or other original was ordered is the first owner of the copyright (*a*).

In the case of any work, where the author was in the employment of some other person under a contract of service or apprenticeship, and the work was made in the course of his employment by that person, the employer is, in the absence of any agreement to the contrary, the first owner of the copyright (*b*). This provision is subject to the reservation to the author of contributions to a newspaper, magazine, or similar periodical, in the absence of agreement to the contrary, of the right to restrain the separate publication of the work (*c*). In any case, it would seem that the expression 'contract of service' must be construed somewhat narrowly, and would not include cases where the work is done on commission, but not under a contract of service properly so called (*d*).

*Special Crown and other rights.*—The right of the Crown, under the Act of 1911, to the copyright in any work prepared or published by or under the direction of the Crown or any Government department has already been noticed (*e*). Independently of the Act, the Crown has the exclusive right of promulgating to the people all acts of state and government; and, as the Supreme Head of the Church, the Crown has the same prerogative with respect to the liturgies, the books of divine service, and the authorised translation of the Bible, though, as regards the Bible (and also certain law books), the right has been considered as

(*a*) Act of 1911, s. 5 (1).

(*b*) *Ibid.* s. 5 (1).

(*c*) *Ibid.* s. 5 (1).

(*d*) Cf. *Yewens v. Noakes* (1880) 6 Q. B. D. 530; *Simmons v. Heath Laundry Co.* [1910] 1 K. B. 543; and see Robertson, *Law of Copyright*, pp. 80–85. Such cases

as *Lawrence and Bullen, Ltd. v. Aflalo* [1904] A. C. 17, decided on s. 18 of the Copyright Act, 1842, seem to have no application under the present Act.

(*e*) Act of 1911, s. 18; see *ante*, p. 46.

depending upon the circumstance of the work having been first done at the Crown's expense (*a*). These privileges are held, moreover, to extend to the Crown's grantees ; in which capacity the Universities of Oxford and Cambridge, within their respective jurisdictions, and the King's Printer, claim the right of printing the Bible and Book of Common Prayer, and Acts of Parliament and other Acts of State, to the exclusion of all other presses (*b*).

The Universities of Oxford and Cambridge enjoyed also, by the Copyright Act, 1775, the sole liberty of printing *for ever*, at their own presses, all books of which the copyright had been bequeathed or otherwise given to them, or their respective colleges, in perpetuity. A similar right belonged to the colleges of Eton, Westminster, and Winchester. The Act of 1911 repeals the Copyright Act, 1775, so that no such right can be acquired by these bodies in future ; but it preserves for the bodies above named any copyright which they already enjoyed under that Act, with the proviso, that the remedies and penalties for infringement shall in future be under the Act of 1911, and not under the Act of 1775 (*c*).

The Bodleian Library, Oxford, the University Library, Cambridge, the Library of the Faculty of Advocates at Edinburgh, the Library of Trinity College, Dublin, and, subject to certain restrictions, the National Library of Wales, are entitled on demand to the delivery of a copy of every book published in the United Kingdom ; and a copy must be delivered to the British Museum without demand (*d*).

*Assignment and devolution of copyright.*—The owner of the copyright in any work may assign the right,

- |   |                                       |
|---|---------------------------------------|
| ( <i>a</i> ) <i>Millar v. Taylor</i> (1769) | <i>University</i> (1758) 2 Burr. 661. |
| 4 Burr. 2329.                               | ( <i>c</i> ) Act of 1911, s. 33.      |
| ( <i>b</i> ) <i>Baskett v. Cambridge</i>    | ( <i>d</i> ) <i>Ibid.</i> s. 15.      |

either wholly or partially, and either generally or subject to local limitations, and either for the whole term of the copyright or for any part thereof. He may also grant any interest in the right by licence. No such assignment or grant is valid, unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorised agent (*a*). The requirements of various statutes for the registration of copyright are now abolished (*b*).

Every such assignment or grant of copyright or licence is, however, now subject to the novel provision, that, if made after the passing of the Act, it will not be operative to vest in the assignee or grantee any right in the work beyond the expiration of twenty-five years from the death of the author. The reversionary interest in the copyright expectant on the termination of that period devolves, notwithstanding any agreement to the contrary, on the author's legal personal representatives, as part of his personal estate. Any agreement entered into by the author as to the disposition of such reversionary interest is void; but these provisions do not apply to the assignment of the copyright in a collective work, or to a licence to publish a work or part of a work as a collective work (*c*). A 'collective work' means (*a*) an encyclopædia, dictionary, year-book or similar work; (*b*) a newspaper, review, magazine, or similar periodical; (*c*) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated (*d*).

There appears to be no doubt that copyright and any interest therein will, on the death of the owner,

(*a*) Act of 1911, s. 5 (2).

(*b*) Copyright Act, 1842, s. 23; Fine Arts Copyright Act, 1862, s. 12; Copyright Act, 1911, s. 36 and Schedule.

(*c*) Act of 1911, s. 5 (2).

(*d*) Act of 1911, s. 35.

Mr. Robertson is of opinion that this definition includes every work of joint authorship (*Law of Copyright*, p. 96).

devolve as personal estate; but, apart from the provision above-mentioned as to the devolution of the author's reversionary interest, there is no provision to this effect in the Act of 1911, as there was in some of the earlier Acts (a).

*Restrictions and limitations on the owner's right.—*

At any time after the expiration of twenty-five years (or, in the case of a work in which copyright subsists at the passing of the Act (b), from the death of the author of a published work, thirty years), copyright in the work will not be deemed to be infringed by the reproduction of the work for sale, if the person reproducing the work proves that he has given notice in writing of his intention to do so, and has paid all royalties to, or for the benefit of, the owner of the copyright in respect of all copies sold by him. The royalties are to be at the rate of ten *per cent.* on the published price. The Board of Trade is authorised to make regulations prescribing the modes in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties (c).

At any time after the death of the author of a literary, dramatic, or musical work, which has been published or publicly performed, complaint may be made to the Judicial Committee of the Privy Council that the owner of the copyright has refused to republish it, or to allow its republication or public performance, and that, by reason of such refusal, the work is withheld from the public. Upon such complaint being made, the owner may be ordered to grant a licence for the reproduction or public performance of the work, on such terms and subject to such conditions, as the Judicial Committee may think fit (d).

(a) Copyright Act, 1842, 1911.

s. 25; Fine Arts Copyright Act, 1862, s. 3.

(c) Act of 1911, s. 3.

(d) *Ibid.* s. 4.

(b) *I.e.* 16th December,



*Infringement of copyright and the remedies therefor.*

—Subject to certain exceptions, copyright in a work is deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is conferred by the Act on the owner of the copyright (a). It is further deemed to be infringed by any of the following acts, *i.e.*,

- (a) by the selling or letting for hire of a work, or by way of trade exposing or offering it for sale or hire (b) ;
- (b) by its distribution either for purposes of sale, or to such an extent as prejudicially to affect the owner of the copyright (c) ;
- (c) by its exhibition in public by way of trade ;
- (d) by its importation for sale or hire into any part of His Majesty's dominions to which the Act extends ;

but only if, in any of these cases, the person so acting knows that the work with which he so deals infringes copyright, or would infringe copyright if it had been made in the part of His Majesty's dominions in which the act is done (*d*).

Copyright is further deemed to be infringed by any person who, for his private profit, permits a theatre or place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright ; unless he was not aware, and had no reasonable ground for suspecting, that the performance of the work would be an infringement of copyright (e).

The most general exception from the definition of infringement is contained in the provision that any fair dealing with any work for the purposes of private

- (a) Act of 1911, s. 2 (1).  
See *ante*, p. 44.  
(b) *Britain v. Kennedy*  
(1902) 19 T. L. R. 122.  
(c) Cf. *Norello v. Sudlow*  
(1852) 12 C. B. 177; *Ager*  
*v. Peninsular and Oriental*  
*Steam Navigation Co.* (1884)  
26 Ch. D. 637.  
(d) Act of 1911, s. 2 (2).  
(e) *Ibid.* s. 2 (3).

study, research, criticism, review or newspaper summary is not to constitute an infringement of copyright (a). There are further exceptions in respect of—the use by the author of an artistic work (not being the owner of the copyright), of a mould, cast, sketch, plan, model, or study made by him for the purpose of the work; the making and publication of paintings, drawings, engravings, or photographs of any work of sculpture or artistic craftsmanship permanently situate in a public place, or of any architectural work of art; the publication, in collections mainly composed of non-copyright works and intended for school use, of short extracts from published literary works; and the reading or recitation in public by one person, of reasonable extracts from any published work (b).

With regard to 'lectures' (which include addresses, speeches and sermons (c)), it is provided that it shall not be an infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper (d). It is further provided, with regard to lectures generally, that it shall not be an infringement of copyright to publish in a newspaper a report of a lecture delivered in public; unless the report is prohibited by a conspicuous written or printed notice exhibited as provided by the Act (e). This provision does not affect the previous provision as to newspaper summaries. It is uncertain whether, under the present Act, the reporter of the speech (or the newspaper employing him) acquires any copyright in the report, as was the case under the earlier law (f).

(a) Act of 1911, s. 2 (1) (i.); *Sweet v. Benning* (1855) 16 C. B. 459; *Dicks v. Yates* (1881) 18 Ch. D. at p. 90; *Maple & Co. v. Junior Army and Navy Stores* (1882) 21 Ch. D. 369.

(b) Act of 1911, s. 2 (1) (ii.-iv. and vi.).

(c) *Ibid.* s. 35 (1).

(d) *Ibid.* s. 20.

(e) *Ibid.* s. 2 (1) (v).

(f) *Walter v. Lane* [1900] A. C. 539.

The Act provides that the making of records, perforated rolls, and other contrivances for the mechanical delivery of musical works shall, subject to certain conditions, not be deemed to be an infringement of copyright in a musical work. But, in order to get the benefit of this provision, the maker of such contrivances must prove that he has given notice in the prescribed form, or paid royalties in the prescribed manner, to or for the benefit of the owner of the copyright (*a*). In the case of works not published before the commencement of the Act, he must further prove, that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright (*b*).

Where copyright in any work has been infringed, the owner of the copyright may sue the infringer and obtain an injunction to restrain the continuance or repetition of the infringement; except that he cannot obtain an injunction to restrain the construction of a building or structure which has been commenced, or to order its demolition (*c*). He may also in such action obtain damages or an account of the profits made by the infringer (*d*); but the plaintiff will not be entitled to any remedy other than an injunction, if the defendant alleges in his defence that he was not aware of the existence of copyright in the work, and proves that, at the date of the infringement, he was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work (*e*). An action in respect of infringement of copyright cannot be commenced more than three years after the infringement (*f*).

(*a*) Records made before the commencement of the Act must not be sold afterwards without payment of royalties (*Monckton v. Pathé, Ltd.* (1913), 30 T. L. R. 123).

(*b*) Act of 1911, s. 19.

(*c*) *Ibid.* ss. 6, 9.

(*d*) *Ibid.* s. 6.

(*e*) *Ibid.* s. 8.

(*f*) *Ibid.* s. 10.

Apart from the right of the owner of copyright to sue in respect of infringement, it is provided that all infringing copies and all plates used or intended to be used for the production of infringing copies shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof, or in respect of the conversion thereof (*a*). This provision does not apply to any building or structure which infringes, or would, if completed, infringe copyright (*b*).

Summary remedies (in addition to those imposed by the Musical (Summary Proceedings) Copyright Act, 1902, and the Musical Copyright Act, 1906) are provided by the Act of 1911. A person who knowingly commits certain acts which constitute an infringement of copyright is liable, on summary conviction, to pecuniary penalties not exceeding forty shillings for each copy dealt with, and not exceeding fifty pounds for each transaction; and, on a second or subsequent offence, he is liable to the like penalties or to imprisonment, with or without hard labour, for a term not exceeding two months. The Court which convicts may order the destruction or delivery up of offending copies or plates (*c*).

The Act also contains provisions enabling the owner of copyright to call on the Commissioners of Customs and Excise to prohibit the importation of infringing copies (*d*).

*Colonial copyright.*—The Copyright Act, 1911, is declared to extend throughout His Majesty's dominions, except as to certain provisions which are expressly restricted to the United Kingdom (*e*). But this is subject to considerable limitations.

In the first place, it is not to extend to a self-govern-

(*a*) Act of 1911, s. 7.

(*d*) *Ibid.* s. 14.

(*b*) *Ibid.* s. 9.

(*e*) *E.g.*, the provisions as to

(*c*) *Ibid.* s. 11.

summary remedies (s. 13).

ing dominion (*a*), unless declared by the legislature of that dominion to be in force therein, either without modifications or additions, or with modifications and additions relating exclusively to procedure or remedies, or necessary to adapt the Act to the circumstances of the dominion (*b*).

In the second place, the legislature of any self-governing dominion may at any time repeal all or any of the enactments passed by Parliament relating to copyright (including the Act of 1911), so far as they are operative within that dominion. In any self-governing dominion to which the Act of 1911 does not extend, the enactments repealed by that Act, so far as they are operative in that dominion, are to continue in force until repealed by the legislature of that dominion (*c*).

Thirdly, the legislature of any British possession to which the Act extends may modify or add to its provisions; but, except as regards changes in procedure and remedies, such modifications and additions shall apply only to the works of authors who, at the time of making them, were resident in the possession, and to works first published in the possession (*d*).

There are two provisions under which (apart from the adoption by the legislature of the dominion) the Act of 1911 may be partially applied in relation to a self-governing dominion.

1. The Secretary of State for the Colonies (*e*) may certify that a self-governing dominion has passed legislation conferring within that dominion rights substantially identical with those conferred by the Act, upon works of authors, who, at the time of making the works, were British subjects not resident in that dominion, or (not being British subjects) were resident

(*a*) *I.e.*, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.

(*b*) Act of 1911, s. 25 (1).

(*c*) *Ibid.* s. 26.

(*d*) *Ibid.* s. 27.

(*e*) Interpretation Act, 1889, s. 12 (3).

in the parts of the British dominions to which the Act extends. The effect of such a certificate, so long as it continues in force, is that, for the purposes of the rights conferred by the Act of 1911, the dominion is to be treated as if it were a dominion to which the Act extends (a).

2. His Majesty in Council, if satisfied that the law of a self-governing dominion provides adequate protection within that dominion for the works (published or unpublished) of authors who, at the time of making the work, were British subjects not resident in that dominion, may, for the purpose of giving reciprocal protection, by Order in Council direct that the Act (subject to any exceptions and conditions specified in the Order) shall, within the parts of His Majesty's dominions to which the Act extends, apply to the works of authors who were at the time of making the work resident within the first mentioned dominion and to works first published in that dominion. Such Order is not to confer any rights within a self-governing dominion ; but the Governor in Council of any such dominion may by Order in Council confer the like rights (b).

His Majesty may by Order in Council extend the Act to any territories under his protection, and to Cyprus (c).

*International copyright.*—The foregoing provisions are contained in Part I. of the Act of 1911. By Part II. of the Act, His Majesty is authorised to make Orders in Council, relating to any foreign country. The effect of such an Order is that, for the purpose of applying the Act—(a) publication or residence in a country to which such Order relates is equivalent to publication or residence respectively within the parts of the British Dominions to which the Act extends, and (b) the nationality of an author who is a subject or citizen of such foreign country is equivalent to British nationality (d).

(a) Act of 1911, s. 25 (2).

(c) *Ibid.* s. 28.

(b) *Ibid.* s. 26 (3).

(d) *Ibid.* s. 29.

Before making any such Order in Council in respect of any foreign country (other than a foreign country with which His Majesty has entered into a convention relating to copyright) His Majesty shall be satisfied that the foreign country has made, or has undertaken to make, such provisions, if any, as it appears expedient to require, for the protection of works entitled to copyright under Part I. of the Act. The Order may be made subject to certain exceptions and modifications ; and, in particular, it may provide that the term of copyright within the parts of the British dominions to which the Act extends shall not exceed the term conferred by the law of the country to which the Act relates (*a*).

Such an Order has no application to a self-governing dominion ; but the Governor in Council of any such dominion may make Orders having a corresponding effect with respect to that dominion (*b*).

### III.—TRADE MARKS AND TRADE NAMES.

*Definitions and history.*—A trade mark is defined by the Trade Marks Act, 1905, as “ a mark used or proposed “ to be used upon or in connection with goods, for the “ purpose of indicating that they are the goods of the “ proprietor of such trade mark, by virtue of manufac- “ ture, selection, certification, dealing with, or offering “ for sale ” (*c*). Previously to the Trade Marks Registra- tion Acts, 1875 to 1877, there was no property (strictly speaking) recognised by law in any trade mark or trade name ; but there was a sort of qualified right therein recognised by the law (sometimes spoken of as a right of property), upon the principle that “ one man has no “ right to put off his goods for sale as the goods of a

(*a*) Act of 1911, s. 29.

(*b*) *Ibid.* s. 30.

(*c*) 5 Ed. 7, c. 15, s. 3.  
See *Re Austrahan Wine Im-  
porters, Ltd.* (1889) 41 Ch. D.,

at p. 280 ; *Re Apollinaris  
Co.'s T. M.* [1891] 2 Ch. at  
p. 234 ; *Richards v. Butcher*,  
*ibid.*, at p. 543.

“ rival trader ; and he cannot, therefore, be allowed to  
 “ use names, marks, letters, or other *indicia*, by which  
 “ he may induce purchasers to believe that the goods  
 “ which he is selling are the manufacture of another  
 “ person ” (a). This principle still exists independently  
 of statute (b) ; and in all such cases the right turns on  
 the question whether the name or mark has by user  
 become so identified in the mind of the public with  
 the goods of a particular manufacturer or trader, that  
 the use thereof by a rival does, or is likely to, deceive.  
 Even the form and get up of the goods may become  
 identified in the mind of the public with the goods of  
 a particular manufacturer ; and, in such a case,  
 another manufacturer will not be allowed to put on the  
 market rival goods with a similar form or get up (c).

An exclusive right to a trade mark, which, as distinguished from a mere means of preventing fraud, may be properly called proprietary, and which is capable of being acquired by registration, not merely by user, was first given by the Trade Marks Registration Acts, 1875 to 1877. These Acts have been repealed ; and the law on this subject is now governed by the Trade Marks Act, 1905, which consolidates and amends the provisions (now also repealed) relating to trade marks, contained in the Patents, Designs, and Trade Marks Acts, 1883 to 1888 (d).

By the Trade Marks Act, 1905, it is provided, that the registration of a person as proprietor of a trade

(a) *Leather Cloth Co. v. American Leather Cloth Co.* (1865) 11 H. L. C. 538 ; *Thompson v. Montgomery* [1891] A. C. 217.

(b) *Powell v. Birmingham Co.* [1896] 2 Ch. 54 ; *Reddaway v. Banham* [1896] A. C. 199 ; *Payton v. Snelling* [1901] A. C. 308 ; Trade Marks Act, 1905, s. 45.

(c) *Edge v. Nicolls* [1911] A. C. 693.

(d) The (consolidating) Patents and Designs Act, 1907, includes certain enactments relating to trade marks (e.g. s. 91) ; but, generally speaking, the law of trade marks is now separated from the Law of Patents.



mark shall, if valid, give to such person the exclusive right to the use thereof in connection with the goods in respect of which it is registered (a); though in certain cases concurrent registration by more than one proprietor in respect of the same goods is permitted (b). In all legal proceedings relating to a registered trade mark, the fact that a person is registered as proprietor is *prima facie* evidence of the validity of the original registration and of subsequent assignments and transmissions (c); and, after the expiration of seven years, the original registration must be taken to be valid in all respects, unless such registration was obtained by fraud, or the trade mark offends against the provisions of the Act, which prohibits the registration of any matter, the use of which, as being deceptive (d) or otherwise, would be disentitled to protection, or would be contrary to law or morality, and of any scandalous design (e). A trade mark is assignable and transmissible, but only in connection with the goodwill of the business concerned in the goods for which it is registered; and it is determinable with that goodwill (f). For registration is possible only in respect of particular goods or classes of goods (g).

A Register of Trade Marks (in which the registers kept under previous Acts are incorporated) is established at the Patent Office (h); for Sheffield ware there is a corresponding register at Sheffield, kept by the Cutlers' Company (i); and for cotton goods

(a) Act of 1905, ss. 38, 39.

(b) *Ibid.* ss. 19, 21, 39.

(c) *Ibid.* s. 40.

(d) As to marks which are 'calculated to deceive,' see *Re Casella & Co.* [1910] 2 Ch. 240; *Re Carvino T. M.* [1911] 2 Ch. 572; *Re Van de Leeuw's T. M.* [1912] 1 Ch. 40.

(e) Act of 1905, ss. 11, 41.

(f) *Ibid.* ss. 22, 38; *Lecou-*

*turier v. Rey* (the case of the Pères Chartreux) [1910] A. C. 262. (In cases where the goodwill of a business is divided, the Registrar may permit an apportionment of the registered marks (s. 23).)

(g) Act of 1905, s. 8.

(h) *Ibid.* ss. 4, 6.

(i) *Ibid.* c. 63.

there is a special Manchester branch of the Trade Marks Registry (a).

By the Patents and Designs Act, 1907 (b), the Crown is enabled to make an arrangement with the government of any foreign state for the mutual protection of trade marks, in the same way as arrangements may be made for the mutual protection of patents.

*Registrable trade marks.*—In order to be capable of registration under the Act, a trade mark must contain, or consist of, at least one of the following essential particulars, namely—(1) the name of a company, individual, or firm represented in a special or particular manner; (2) the signature of the applicant for registration or some predecessor in his business; (3) an invented word or invented words; (4) a word or words having no direct reference to the character or quality of the goods, and not being, according to ordinary signification, geographical names or surnames (c); (5) any other distinctive mark. But a name, signature, word, or words will not (except by order of the Board of Trade or of the Court) be deemed a distinctive mark; unless falling within the heads numbered (1) to (4) (d). The Court will not order merely laudatory or descriptive words to be registered under the last-mentioned provision; nor has a so-called phonetic spelling of such words any greater right to registration (e). If a

(a) Act of 1905, s. 64.

(b) S. 91.

(c) An *invented* word may be validly registered, although it has reference to the character or quality of the goods. (*Eastman Co. v. Comptroller* ('*Solio*') [1898] A. C. 571; *Re Linotype Co.'s Trade Mark* [1900] 2 Ch. 238). But misspelling common English words, or adding a common

suffix, is not invention (*Re 'Unedea' Trade Mark* [1902] 1 Ch. 783; *Christy v. Tipper* ('*Absorbine*') [1904] 1 Ch. 696).

(d) Act of 1905, s. 9; *Re Whitfield's Bedsteads Application* [1909] 2 Ch. 373. (Even a surname, if very uncommon, may be 'distinctive' for this purpose (*Re Teofani & Co.'s T. M.* [1913] 2 Ch. 545).

(e) *Re Joseph Crosfield &*

trade mark contains (as it may do) parts not separately registered, or matter common to the trade or otherwise non-distinctive, the Registrar, or the Board of Trade, or the Court, may require the proprietor to disclaim the right to the exclusive use of such parts or matter (a). No registration under the Act is to interfere with any *bonâ fide* use by any person of his own name or place of business, or that of his predecessors in business, or the use by any person of any *bonâ fide* description of the character or quality of the goods (b). 'Old marks,' *i.e.*, any special or distinctive word or words, letter, numeral, or combination of letters or numerals, used as a trade mark before the 13th August, 1875, may be registered under this, as under previous Acts (c).

*Remedies of registered owner.*—The owner of a trade mark, being first duly registered, may now, without any proof of fraud, obtain an injunction and damages or an account of profits for the unauthorised use of his trade mark (d); but no damages or account of profits will be given against an innocent infringer (e). By the Merchandise Marks Act, 1887, the forgery of any registered trade mark, or its false application to goods like those in respect of which the mark has been registered, together with many other incidental acts of the like false and fraudulent character, are made criminal offences, and punishable accordingly (f). On

*Sons, Ltd.* ('Perfection')  
[1910] 1 Ch. 130, *Re H. N. Brock, Ltd.* ('Orhwoola')  
*ibid.*; *Re Gramophone Co.'s Application* ('Gramophone')  
[1910] 2 Ch. 423.

(a) Act of 1905, s. 15.

(b) *Ibid.* s. 44.

(c) *Ibid.* s. 9; cf. *Re Cheesborough's Trade Mark* [1902] 1 Ch. 1.

(d) *Upmann v. Forrester* (1883) 24 Ch. D. 231; *Lever v. Goodwin* (1887) 36 Ch. D. 1; *Saxlehner v. Apollinaris' Co.* [1897] 1 Ch. 893.

(e) *Slazenger v. Spalding* [1910] 1 Ch. 257.

(f) *R. v. Butcher* [1908] 24 T. L. R. 797; *R. v. Phillips* (1908) 25 T. L. R. 764; *Stone v. Burn* (1910) 27 T. L. R. 6.

the other hand, the registration of a trade mark when it has been registered without sufficient cause, or wrongly allowed to remain on the register, may be expunged or otherwise rectified by the Court, upon the application of any person aggrieved, or (in the case of fraud in the registration or transmission) upon the application of the Registrar himself (*a*). Moreover, upon the application of any person aggrieved, a trade mark may be taken off the register in respect of any goods for which it is registered ; on the ground that it was registered without any *bonâ fide* intention to use it in connection with such goods, and that there has in fact been no such *bonâ fide* user, or on the ground that there has been no such *bonâ fide* user during the five years immediately preceding the application (*b*). The falsification of entries in the register, or the making or use as evidence of false copies of entries, is a misdemeanour (*c*) ; and any person who represents a trade mark as registered which is not so, is liable on summary conviction to a fine not exceeding five pounds (*d*).

*Trade names.*—The trade name of an individual or firm (except in some distinctive form, or as a signature, or, in special cases, by order of the Board of Trade or the Court) is not the subject of registration under the Acts ; but any one has a common law right to restrain another person from fraudulently employing his (the former's) trade name, or any colourable imitation of it, in such a way as to be calculated to deceive the public by confusing the public as to the identity of the two persons and the goods sold by them (*e*). Indeed a

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| (a) Act of 1905, s. 35.                      | v. <i>Valentine Extract Co.</i> (1900) |
| (b) <i>Ibid.</i> s. 37 ; <i>Batt v. Dun-</i> | 83 L. T. 259 ; <i>Cash v. Cash</i>     |
| <i>nett</i> [1899] A. C. 428.                | (1901) 86 L. T. 211 ; <i>Re</i>        |
| (c) Act of 1905, s. 66.                      | <i>Teofani's T. M.</i> [1913] 2 Ch.    |
| (d) <i>Ibid.</i> s. 67.                      | 545.                                   |
| (e) <i>Valentine Meat Juice Co.</i>          |  |

person may even be restrained from using his own name dishonestly in such a way as to deceive (a).

#### IV.—DESIGNS.

*History of the law.*—The protection of designs began with an Act of 1787, dealing with patterns for printing linens, calicoes, cottons, and muslins; and this protection was subsequently extended to designs for other classes of goods. These Acts were repealed by the Copyright in Designs Act, 1842, which gave a more general protection. This Act in turn, together with a number of amending Acts, was repealed by the Patents, Designs, and Trade Marks Acts, 1883; and the law on this subject is now governed by the Patents and Designs Act, 1907.

*Registration of designs under the Act of 1907.*—A design, as defined by the Act of 1907, may be applicable to the pattern, shape, configuration, or ornament of any article of manufacture, or of any substance, natural or artificial, or to any two or more of such purposes. The proprietor (who, as defined by the Act of 1907, must be either the author of the design or some person deriving title from the author for good consideration, or by devolution) is the person entitled to apply for registration (b). The application need not distinguish what is new from what is old, nor describe the design with the same nicety and accuracy as is required in the specification of a patent (c). But, in order to be registered, the design must be for something new or original, and not already published in the

(a) See *Re Brinsmead* [1897] (1913) 29 T. L. R. 237; *Re*  
1 Ch. 49; *Kingston Miller Teofani's T. M.* [1913] 2 Ch.  
& Co. v. *Thomas Kings-* 545.  
*ton & Co.* [1912] 1 Ch. 575; (b) Act of 1907, s. 93.  
*John Brinsmead & Sons, Ltd.* (c) *McCrea v. Holdsworth*  
v. *E. G. Stanley Brinsmead* (1871) L. R. 6 Ch. App. 420.

United Kingdom (a). The Court is not bound by an admission of one of the parties as to the originality of the design (b). The novelty is not now lost by exhibiting the design at any public show; provided the precautions in that behalf appointed by the Act (being the same precautions as those we referred to when speaking of the like exhibition of a patent invention (c)), are observed) (d).

Upon application being duly made to the Comptroller, accompanied by the prescribed number of drawings, photographs, or tracings, or of specimens of the design itself, the Comptroller may register the design (e); and there is to be kept at the Patent Office a book called the Register of Designs, in which the names of all registered proprietors are to be entered, and all assignments of their titles. And the register is *primâ facie* evidence of any matters by the Act directed or authorised to be entered therein (f). The Crown is authorised to make an arrangement with the government of any foreign state for the mutual protection of designs, in the same way as arrangements may be made for the mutual protection of patents (g).

*Effects of registration.*—Upon registration, the proprietor becomes entitled to the copyright of his design for five years from the date of the registration; and he will be entitled to an extension of such copyright

(a) Act of 1907, s. 49; 117.

*Harper v. Wright* [1896] 1 Ch.

143; *Heath v. Rollason* [1898]

A. C. 499; *Dover, Ltd.*

*v. Nurnberger Celluloidwarenfabrik*

[1910] 2 Ch. 25. It

was held in *R. v. Firmin*

(1858) 3 H. & N. 304, that the

novelty might consist in mere

combination; but see *Lazarus*

*v. Charles* (1873) L. R. 16 Eq.

(b) *Gramophone Co. v.*

*Magazine Holder Co.* (1911)

104 L. T. 259; 28 R. P. C.

221.

(c) See *ante*, p. 28.

(d) Act of 1907, s. 59.

(e) *Ibid.* ss. 49, 50.

(f) *Ibid.* s. 52.

(g) *Ibid.* s. 91.

for a second term of five years, if he duly applies before the end of the first period. A third period may be granted to him by the Comptroller on application before the end of the second period ; if the Rules issued under the Act are complied with (*a*). Formerly, the proprietor forfeited such copyright, if he failed, before delivery on sale of any articles to which a registered design had been applied, to cause each article to be marked, with the prescribed mark, words, or figures ; but now the only result of such omission is, that he is, except in certain cases, unable to recover damages or penalties for infringement of his design (*b*).

During the existence of the copyright, it is not lawful for any person (without the licence or written consent of the registered proprietor) to apply, or cause to be applied, such design, or any fraudulent or obvious imitation (*c*) thereof, to goods in the class or classes in respect of which such design is registered, for purposes of sale ; and further, it is not lawful for any person to publish or expose for sale any goods to which such design, or any fraudulent or obvious imitation thereof, shall have been so applied, knowing that the same has been so applied without the consent of the registered proprietor ; And it is an offence under the Act to do anything within the United Kingdom with a view to enable a registered design to be applied for purposes of sale without the consent of the registered proprietor ; although the intended application is to take place abroad (*d*). Any person contravening these provisions is made liable to forfeit, for every contravention, a

(*a*) Act of 1907, s. 53.

(*b*) *Ibid.* s. 54 (*b*).

(*c*) It has been suggested, that only an exact reproduction is an infringement, and that a merely colourable alteration is sufficient to take an imitation out of the Act

(*per* Lord Halsbury, in *Gramophone Co. v. Magazine Holder Co.* (1911) 104 L. T. 259 ; 28 R. P. C. 221). But see *per* Lord Shaw, *ibid.*

(*d*) *Haddon & Co. v. Banerman* [1912] 2 Ch. 603.

sum not exceeding fifty pounds; the registered proprietor of the design being entitled to recover such sum, as a simple contract debt, by action in any Court of competent jurisdiction (*a*). In lieu of such penalty, the registered proprietor may bring an action for the recovery of damages for such contravention, and for an injunction to restrain the repetition thereof (*b*). The provisions of the Act in regard to certificates of the validity of patents, to the remedy in case of groundless threats of legal proceedings by a patentee, and to revocation of a patent on the ground that it is being chiefly worked outside the United Kingdom (*c*), apply, *mutatis mutandis*, in the case of registered designs (*d*).

(*a*) Act of 1907, s. 60. The total sum recoverable as a simple contract debt in respect of any one design is not to exceed £100.

(*b*) Act of 1907, s. 60 (2).

(*c*) *Ante*, pp. 39–41.

(*d*) Act of 1907, ss. 58, 61.



## CHAPTER IV.

## OF TITLE BY GIFT AND BY ASSIGNMENT.

PROPERTY in things personal is transferable with absolute freedom ; and any absolute assignment which should be expressed to be subject to a prohibition against any further subsequent assignment of the property would, so far as the prohibition was concerned, be void, both as being repugnant to the gift itself, and as being against the policy of the law (*a*). It is true that the assignee might by contract bind himself not to alienate except on certain terms—*e.g.*, not to sell below a certain price ; and any person who knowingly induced him to break his contract might be made liable in tort for doing so (*b*). But, except in the case of patented articles, and there only to the extent previously described (*c*), no such restriction could be attached to the property itself, so as to bind a subsequent purchaser, even with notice (*d*).

There are some cases, however, where the right of disposal is, in respect of the incapacity of the owner, suspended ; as to which it will be sufficient in this place to remark, that the law relating to the disability of infants, insane persons, and persons under duress, applies in general to personal as well as to real

(*a*) Co. Litt. 223 a ; *Brandon v. Robinson* (1812) 18 Ves. 429.

(*b*) *Ellimans v. Carrington* [1901] 2 Ch. 275 ; *National Phonograph Co. v. Edison Bell*

*Co.* [1908] 1 Ch. 335.

(*c*) See *ante*, p. 36.

(*d*) *Taddy v. Sterious* [1904] 1 Ch. 354 ; *M'Gruther v. Pitcher* [1904] 2 Ch. 306.

property (*a*). In cases where the old law, as existing previous to the Married Women's Property Acts, 1870 and 1882, still applies, a married woman, also, may still be under an incapacity to alienate things personal, as well as things real; except, of course, where the property belongs to her for her separate use without restraint on anticipation. There are also some few cases where, in respect of the nature of the interest itself, its transfer is absolutely prohibited; *e.g.*, the pay or half-pay of a military or naval officer, or the salary attached to any public office of trust, which are, on grounds of public policy, not assignable, the object being to secure to such persons, even against their own improvidence, the possession of the means which are essential to the due performance of the duties of their station (*b*), while they either are engaged in, or are liable to be recalled to, the discharge of such duties (*c*). So, also, and partly for the like reason, the assignment of alimony is illegal (*d*); and the assignment or sale of a public appointment is contrary to the policy of the law, and is prohibited in most cases by express enactments of the legislature (*e*).

And property *in futuro*, *e.g.*, goods not yet manufactured, or goods or machinery not yet (but which were afterwards to be) brought upon any specified premises, used not to be assignable at law. But in equity the purported assignment of these things was deemed a contract to assign them, which contract (when for

(*a*) *Ante*, bk. ii. pt. 1. ch. xvii. (vol. i. pp. 369–377). Yet it was held that a gift of personality (passing by delivery) made by an infant could not, in the absence of fraud or undue influence, be avoided after the infant's death (*Taylor v. Johnston* (1882) 19 Ch. D. 603).

(*b*) *Apthorpe v. Apthorpe* (1887) 12 P. D. 192.

(*c*) *Lucas v. Harris* (1887) 18 Q. B. D. 127.

(*d*) *Linton v. Linton* (1880) 15 Q. B. D. 239; *Re Robinson* (1884) 27 Ch. D. 160.

(*e*) 5 & 6 Edw. 6 (1552) c. 16; 49 Geo. 3 (1809) c. 126.

value) was considered as being in effect performed when the goods had been manufactured or brought upon the premises ; and so the assignment was deemed effectual in equity, in the sense that the assignee's right would be upheld against anyone save a purchaser for value and without notice, who had obtained the legal title to the property (*a*). The so-called ' fusion of law and equity ' which was effected by the Judicature Act, 1873 (*b*), means that all divisions of the High Court must now enforce such equitable right ; but assignments of future property have no greater effect than they had previously (*c*). In any case, such assignments may be void as conflicting with the Bills of Sales Acts, hereafter mentioned (*d*) ; and an assignment of future property if not made for value is inoperative both at law and in equity (*e*). *Choses in action* were also, by the strict rule of the common law, incapable of being assigned ; but in equity they were assignable, subject to certain conditions, and are now, generally speaking, transferable legally under the Judicature Act, 1873. This subject is, however, more fully dealt with later in this work (*f*).

A transfer *inter vivos* of personal property may be either (1) gratuitous, in which case it is usually called a *gift*, or (2) not gratuitous, but for value ; to which latter case, we shall in this chapter apply the term *assignment*.

1. A GIFT is open—particularly when made in favour of a stranger, and not a relative—to some degree of suspicion ; and, as against the creditors of the donor at the time of the donation, the gift, if

(*a*) *Bac. Max. Reg.* 14 ; *Holroyd v. Marshall* (1864) 10 H. L. C. 191 ; *Tailby v. Official Receiver* (1888) L. R. 13 App. Ca. 523.

(*b*) S. 25.

(*c*) *Joseph v. Lyons* (1884)

15 Q. B. D. 280.

(*d*) See *post.* pp. 76–83.

(*e*) *In re Ellenborough* [1903] 1 Ch. 697.

(*f*) *Post.* ch. v., s. xii., pp. 249–256.

in fraud of creditors, is made void by the statute 13 Eliz. (1571) c. 5. And even as against the donor himself, a gift of corporeal personal property, to be valid in law, must be accompanied either by the solemnity of a deed, or by delivery of possession (*a*). A gift, which passes the legal ownership must be carefully distinguished from a declaration of trust, which may be made as regards personal property even by word of mouth, whereby the person making the declaration retains such ownership but becomes trustee for another; and an intended gift which fails for want of a deed or delivery, will not be construed as a declaration of trust (*b*). But when the gift is once perfected, either by execution of the deed or by a complete delivery of the thing, or where there is a complete declaration of trust, it is not in the donor's power to retract it, though made without any consideration or recompense; unless, indeed, he was under some legal incapacity (such as infancy) (*c*), or was drawn in, circumvented, or imposed upon by false pretences, surprise, or other unlawful inducement, to make the gift.

There are also several cases in which, owing to the donee being in a fiduciary relationship to the donor, a gift is presumed to be made under undue influence, and therefore voidable; unless the donee can repudiate the presumption, by proving that the donor acted under independent advice. Among such cases are gifts by wards to guardians, clients to solicitors, or persons of any kind to their spiritual superiors or advisers (*d*).

There is also a species of gift called a *donatio mortis*

(*a*) *Irons v. Smallpiece* (1819) 2 B. & Ald. 552; *Heartley v. Nicholson* (1874) L. R. 19 Eq. 233; *Breton v. Cochrane v. Moore* (1890) 25 Q. B. D. 57; *Kilpin v. Ratley* [1892] 1 Q. B. 582.

(*c*) But see *Taylor v. Johnston* (1882) 19 Ch. D. 603.

(*b*) *Richards v. Delbridge* (1874) L. R. 18 Eq. 11;

(*d*) *Allcard v. Skinner* (1887) 36 Ch. D. 145; *Liles*

*causâ*, which, though made *inter vivos*, does not take effect till after the death of the donor. It arises when a person in his last sickness, apprehending his dissolution to be near, delivers or causes to be delivered to another the possession of any personal goods to keep in case of his decease (*a*). Which gift, if the donor die, needs not the assent of his executor, yet is accompanied with this implied trust or condition: that if the donor lives, the property shall revert to himself, being given only in contemplation of death, or *mortis causâ* (*b*). Being in the nature of a legacy, this donation might always have been made by a husband to his wife, though an ordinary gift *inter vivos* could not formerly have taken place directly between them (*c*). But, to render a *donatio mortis causâ* in any case effectual, it must be accompanied by a delivery of the chattel, or of the instrument—such as a bond or note, and the like—by which it is secured (*d*); and the executor or administrator of the donor is, in such a case, bound to put the instrument in suit for the benefit of the donee (*e*). A *donatio mortis causâ* is ambulatory, and is capable of revocation up to the death of the donor (*f*), and may be revoked by his will; but such revocation will not be inferred merely from the fact that the donor by his will gives the donee a legacy of equal amount (*g*). The gift will be revoked, even after a complete delivery, if the possession be

*v. Terry* [1895] 2 Q. B. 679; *Barron v. Willis* [1899] 2 Ch. 578. See *post*, pp. 134–136.

(*a*) *Tate v. Hilbert* (1793) 2 Ves. Jun. 111; *In re Kirkley* (1909) 25 T. L. R. 522.

(*b*) *Hills v. Hills* (1841) 8 M. & W. 401.

(*c*) *Miller v. Miller* (1735) 3 P. Wms. 358.

(*d*) *Re Mead* (1880) 15 Ch.

D. 651; *Re Dillon* (1890) 44 Ch. D. 76; *Re Weston* [1902] 1 Ch. 680; *Re Beaumont*, *ibid.* 889.

(*e*) *Rolls v. Pearce* (1877) 5 Ch. D. 730.

(*f*) *Re Hudson* [1911] 1 Ch. at p. 212.

(*g*) *Hudson v. Spencer* [1910] 2 Ch. 285.

resumed by the donor (*a*). On the other hand, an *antecedent* delivery to the donee—although in the capacity of bailee for the donor—would suffice ; if the quality of the possession should have been sufficiently changed before the death (*b*).

2. An ASSIGNMENT for value, *i.e.*, a sale or mortgage, of chattels personal may in general be made by parole, that is, either by mere writing, or simply by word of mouth (*c*) ; and, being for value, it does not require the solemnity of a deed, nor even the delivery of possession (*d*). If made in writing, it may be either in the form of a mere note or memorandum, or by a regular deed of assignment ; which latter is ordinarily denominated a *bill of sale*. In the case of goods sent from abroad by ship to a person resident in this country, or *vice versâ*, the transfer of the property therein is commonly authenticated, or (as the case may be) originally evidenced, by an instrument not under seal, termed a *bill of lading* ; which is in its form a receipt from the captain to the shipper (usually termed the *consignor*), undertaking on specified conditions to deliver the goods, on payment of freight, to some person whose name is therein expressed, or indorsed thereon by the consignor (*e*). The transfer of this instrument (equally with the actual delivery of the goods) will suffice to pass and transfer to the party so named (usually termed the *consignee*), or to his *indorsee for value*, the property in such goods ; and an indorsee

(*a*) This is assumed in *Re Taylor* (1887) 56 L. J. Ch. 597.

The cases of *Ward v. Turner* (1751) 2 Ves. Sen. 233, and *Bunn v. Markham* (1816) 7 Taunt. 224, really turned on the question whether there had been a complete delivery.

(*b*) *Cain v. Moon* [1896] 2

Q. B. 283.

(*c*) *Heath v. Hall* (1813) 4 Taunt. 326. (Such a sale is, of course, subject to s. 4 of the Sale of Goods Act, 1893.)

(*d*) *Martindale v. Booth* (1820) 3 B. & Ad. 507.

(*e*) *Sanders v. Maclean* (1883) 11 Q. B. D. 327.

for value and in good faith will even take the goods free from the unpaid consignor's right to stop the goods *in transitu* (a). And by the Bills of Lading Act, 1855, the indorsee, to whom the property in the goods has passed, has transferred to him all rights of suit, and is subject to the same liabilities, in respect of the goods, as if the contract in the bill of lading had been made with himself (b).

But though generally, and by the common law, personal property may be transferred without the use of writing, there are certain cases in which the statute law has required writing; for, as we shall see later on, either writing, or some delivery or payment, is by statute made essential to a contract for the sale of goods of the value of £10 or upwards (c). And for the transfer of ships, and for the assignment of a patent or of a copyright, writing is also required; and a bill of exchange or a promissory note, when made payable to the *order* of a particular person, can, of course, be assigned by him only by a written indorsement of his name.

Again, though the property in a chattel personal will, on a sale, pass without delivery of possession, yet it is to be remembered, that, by the 13 Eliz. (1571) c. 5, a gift, and even an assignment, of chattels, made with the intent to defeat or delay creditors, is void as against such creditors, though good and effectual as against the grantor himself (d). And one of the principal

(a) *Lickbarrow v. Mason* (1788) 2 T. R. 63; *Gurney v. Behrend* (1854) 3 E. & B. 622; Sale of Goods Act, 1893, s. 47. (As to this, see *post*, pp. 163–164.)

(b) *Sewell v. Burdick* (1885) L. R. 10 App. Ca. 74.

(c) Sale of Goods Act, 1893, s. 4. It would seem that if the requirements of the

statute are not complied with, the property in the goods passes none the less; but the purchaser is disabled from suing for them, and the vendor for the price (*Taylor v. G. E. R. Co.* [1901] 1 K. B. 774).

(d) *Twyne's Case* (1601) 3 Rep. 80 b.





But perhaps the most difficult and practically important questions which arise in connection with the assignment of corporeal chattels, and certainly in connection with alleged fraudulent alienations of them, are concerned with the effect of 'bills of sale,' *i.e.*, assignments by deed of chattels which are intended to continue in the possession of the assignor. By virtue of an old common law rule (*a*), such assignments passed the property in the chattels without delivery to the assignee; but, as time went on, it became increasingly evident that such transactions, by inducing the creditors of the assignor to believe that the goods still belonged to him, procured an undue credit for the assignor, which, in many cases, proved to be disastrous to his creditors. Accordingly, from the middle of the nineteenth century, the legislature turned its attention to the subject, with a view of protecting creditors; and the results of its deliberations must be set out in some detail.

The term 'bill of sale,' in its widest sense, really includes any instrument in writing constituting a document of title to goods sold. Thus, the document of transfer of a British ship, required to be registered under the Merchant Shipping Act, 1894, is known as a 'bill of sale.'

In modern times, however, the expression is commonly used to indicate assurances within the scope of the Bills of Sale Acts, 1878, 1882, 1890, and 1891. In this sense, a bill of sale may be shortly defined as a document whereby a sale, transfer, or mortgage of personal chattels is effected, unaccompanied by any actual transfer of possession of the chattels to the purchaser or mortgagee. And the policy of the Bills of Sale Acts is, by means of a system of compulsory regis-

(*a*) *Butler's and Baker's* Q. B. D. at pp. 67, 68, *per Case* (1591) 3 Rep. at 26 b; *Fry, L.J.*  
*Cochrane v. Moore* (1890) 25

tration, to protect the rights of creditors against secret assignments of chattels, of which the assignor remains in possession (a).

Bills of sale, within the meaning of the Acts, are of two kinds. The first class comprises *absolute* bills of sale, i.e., documents executed with the intention of conferring absolute ownership on a purchaser. The second comprises bills of sale *by way of security*, i.e., documents executed with the purpose of effecting mortgages to secure loans. The Bills of Sale Act, 1878, applies to both kinds; and is the only Act governing absolute bills. The Bills of Sale Act (1878) Amendment Act, 1882, modifies the earlier Act so far as concerns bills by way of security; but it does not apply to absolute bills (b). The Bills of Sale Acts, 1890 and 1891, have no general importance; their effect merely being to exclude from the operation of the principal Acts, instruments hypothecating or charging imported goods, during the interval between their unloading from a ship and their deposit in a warehouse, or reshipping.

Under the Acts of 1878 and 1882, almost every conceivable document which professes or is intended to pass the title to goods without delivery of possession, or to allow goods to be seized, whether it is called an assignment, inventory, declaration of trust, power of attorney, licence, agreement, or attornment (c), is deemed to be a bill of sale requiring registration. But when a document is merely evidence, and not a part of title (d), it is not a bill of sale for the purposes of the

(a) See Lord BLACKBURN'S judgment in *Cookson v. Swire* (1884) L. R. 9 App. Ca. 664.

(b) Act of 1882, s. 3. And see *Swift v. Pannell* (1883) 24 Ch. D. 210. As to the distinction between bills of sale under the two Acts, see *Stocks*

*v. Wilson* [1913] 2 K. B. 235.

(c) Act of 1878, ss. 4, 5, 6.

(d) *M. S. & L. Ry. Co v. North Central Wagon Co.* (1888) L. R. 13 App. Ca. 554; *Charlesworth v. Mills* [1892] A. C. 231.

Acts; and clauses of distress in ordinary leases (*a*), and *bonâ fide* hiring or hire-purchase agreements (*b*), are not within their provisions. Moreover the Act of 1878 expressly exempts from registration certain assurances and instruments (*c*), the chief of which are the following:—marriage settlements (*d*), assignments of ships, transfers of goods in the ordinary course of business of any trade or calling, assignments for the benefit of creditors, bills of lading, and dock warrants. By the Act of 1882 (*e*), debentures and debenture stock of a company are excepted from the operation of the Acts. But companies formed under the Companies (Consolidation) Act, 1908 (*f*), are required to register and file mortgages affecting their property (*g*).

Finally, upon this part of the subject it may be observed, that the Acts do not affect a title to chattels acquired otherwise than in writing. They “avoid documents, not transactions” (*h*). Nor do they apply to documents accompanying a pledge of goods where possession of the goods is actually given (*i*); nor to an assignment for value of *future* chattels, without the right to take possession (*k*). Nor do they affect an agreement whereby a lien is given to a railway company on goods carried by the company and stacked on allotments in a yard belonging to it; the company having the

(*a*) *Pulbrook v. Ashby* (1887) 56 L. J. Q. B. 376.

(*b*) *McEntire v. Crowley Bros.* [1895] A. C. 457; *Maas v. Pepper* [1905] A. C. 102.

(*c*) Act of 1878, s. 4.

(*d*) *Wenman v. Lyon* [1891] 2 Q. B. 192.

(*e*) S. 17; *Clark v. Balm Hill & Co.* [1908] 1 K. B. 667.

(*f*) S. 93; *In re Columbian Fireproofing Co.* [1910] 2 Ch.

120; *In re Orleans Motor Co.* [1911] 2 Ch. 41.

(*g*) *Re Standard Co.* [1891] 1 Ch. 627; *Richards v. Kidderminster* [1896] 2 Ch. 212.

(*h*) *Ramsay v. Margrett* [1894] 2 Q. B. 18.

(*i*) *Ex parte Hubbard* (1883) 17 Q. B. D. 690.

(*k*) *Morris v. Delobbel-Flipo* [1892] 2 Ch. 352.

keys of the yard, and locking the gates at certain times (*a*).

The question of what is included in the expression 'personal chattels' is answered by section 4 of the Act of 1878. It includes "goods, furniture, and other "articles capable of complete transfer by delivery, "and (when separately assigned or charged) fixtures "and growing crops." It does not include chattels real (*b*), fixtures assigned with land (*c*) other than trade machinery (*d*), growing crops assigned with the land on which they grow, or stocks, shares, or *choses in action*. A reversionary interest in settled chattels is a *chose in action* for this purpose (*e*). But certain assignments of book debts are now required to be registered like Bills of Sale (*f*).

We will now enumerate, first, the statutory requirements with regard to absolute bills of sale, and, second, the more drastic provisions of the Act of 1882, which relate exclusively to security bills.

Absolute bills of sale, as already mentioned, are governed solely by the Act of 1878.

An absolute bill of sale must be duly attested by a solicitor; and such attestation must state that, before the execution of the bill, its effect was explained to the grantor by the solicitor (*g*). The consideration must be truly stated (*h*); and the bill must be registered within seven days of its execution, in accordance with the Act (*i*). Upon application for such registration, a true copy of the bill, and of every schedule or inventory annexed to it, and of every attestation of its

(*a*) *Great Eastern Railway Co. v. Lord's Trustee* [1909] A. C. 109.

(*b*) *Swanley Coal Co. v. Denton* [1906] 2 K. B. 873.

(*c*) *Small v. National Provincial Bank* [1894] 1 Ch. 686; *Re Brooke* [1894] 2 Ch. 600.

(*d*) Act of 1878, s. 5.

(*e*) *In re Thynne* [1911] 1 Ch. 282.

(*f*) Bankruptcy and Deeds of Arrangement Act, 1913, s. 14 (see *post*, p. 285.)

(*g*) Act of 1878, ss. 8, 10.

(*h*) *Ibid.* s. 8.

(*i*) *Ibid.*, s. 10.

execution, must be filed ; together with an affidavit proving the date of execution of the bill and its due execution and attestation, and containing particulars of the residence and occupation of the grantor and of every attesting witness (a).

The effect of non-compliance with these requirements, in the case of an absolute bill, is not to make the bill void altogether ; but may be stated shortly as follows. As regards chattels comprised in it which remain in the apparent possession of the grantor, the bill is void as against the trustee in bankruptcy and execution creditors of the grantor, unless it is duly executed, attested, and registered within seven days after the making of it (b). Goods are deemed to be in the ‘ apparent possession ’ of the grantor, “ so long “ as they remain or are in or upon any house, mill, “ warehouse, building, works, yard, land, or other “ premises occupied by him, or are used and enjoyed “ by him in any place whatsoever ; notwithstanding “ that formal possession thereof may have been taken “ by or given to any other person ” (c). But it is to be observed that the Act does not render an un-registered absolute bill void as between grantor and grantee (d). So long as an absolute bill continues to be duly registered, the chattels comprised in it are not deemed to be in the ‘ possession, order, or disposition ’ of the grantor, within the meaning of the Bankruptcy Act, 1883 (e).

(a) *Sharp v. McHenry* (1887) 38 Ch. D. 437 ; *Feast v. Robinson* (1894) 63 L. J. Ch. 321.

(b) Act of 1878, s. 8 ; *Hopkins v. Gudgeon* [1906] 1 K. B. 690.

(c) Act of 1878, s. 4 ; *Robinson v. Briggs* (1870) L. R. 6 Ex. 1 ; *Ramsay v. Margrett* [1894] 2 Q. B. 18 ; *Re Satterthwaite* (1895) 2

*Manson*, 52 ; *Antoniadi v. Smith* [1901] 2 K. B. 589. But see *G. E. R. v. Lord's Trustee* [1909] A. C. 109.

(d) *Davis v. Goodman* (1880) 5 C. P. D. 128 ; *Re D'Epineuil* (1882) 20 Ch. D. 217.

(e) Act of 1878, s. 20 ; *Swift v. Pannell* (1883) 24 Ch. D. 210.

The chief statutory requirements in the case of a bill of sale by way of security are as follows. It must, be made in accordance with the form in the schedule to the Act of 1882 (*a*). It is void *in toto* if it “ departs “ from the statutory form in anything which is a characteristic of that form ” (*b*). It must have annexed to it a schedule containing an inventory of the chattels comprised in it (*c*). It must be duly attested by one or more credible witnesses. Every witness must sign his name and add his address and description (*d*). It must be duly registered within seven days of execution, together with a copy of the bill ; and an affidavit of due execution and attestation must be made, as in the case of an absolute bill (*e*). It must truly state the consideration (*f*). The grantor must be the ‘ true ‘ owner,’ at the time of the execution of the bill, of the chattels described in the inventory. As regards any chattels of which he is not the true owner, the bill is void ‘ except as against the grantor ’ (*g*). The consideration for the bill must not be less than thirty pounds (*h*). Any defeasance, condition, or declaration of trust to which the bill is made subject, must be contained in the bill itself (*i*) ; and terms or covenants contained in the bill must be carefully limited to such as are “ for the

(*a*) Act of 1882, s. 9.

(*b*) *Ex parte Stanford* (1886) 17 Q. B. D. 259 ; *Thomas v. Kelly* (1888) 13 L. R. App. Ca. 506 ; *Seed v. Bradley* [1894] 1 Q. B. 319.

(*c*) Act of 1882, s. 4 ; *Witt v. Banner* (1887) 20 Q. B. D. 114 ; *Thomas v. Kelly, ubi sup.*

(*d*) Act of 1882, s. 10 ; *Parsons v. Brand* (1890) 25 Q. B. D. 110.

(*e*) Act of 1882, ss. 8, 10 ; Act of 1878, s. 10 ; *Heseltine*

*v. Simmons* [1892] 2 Q. B. 547 ; *Darlow v. Bland* [1897] 1 Q. B. 125.

(*f*) Act of 1882, s. 8.

(*g*) Act of 1882, s. 5 ; *Thomas v. Searles* [1891] 2 Q. B. 408.

(*h*) *Ibid.* s. 12 ; *Davis v. Usher* (1883) 12 Q. B. D. 490.

(*i*) Act of 1878, s. 10 ; *Pettit v. Lodge* [1908] 1 K. B. 744 ; *Smith v. Whiteman* [1909] 2 K. B. 437 ; *Hall v. Whiteman* [1912] 1 K. B. 683.

“maintenance or defeasance of the security.” Otherwise the bill will be void (*a*).

But perhaps the most striking rule about security bills is that, even if the requirements of the Act are strictly complied with, the bill will not protect chattels which are in the possession or disposition of the assignor, in his trade or business, at the commencement of his bankruptcy (*b*). Nor can the assignee, even if he knows the assignor is about to become bankrupt, always protect himself by seizing the goods. For his right to seize, remove, or sell the chattels under the bill of sale, is restricted by the Act of 1882, to the following cases:—(1) if the grantor makes default in payment of the debt secured or interest, or in the performance of any agreement contained in the bill necessary for maintaining the security; (2) if the grantor *becomes* bankrupt or suffers the goods to be distrained for rent, rates, or taxes; (3) if the grantor fraudulently removes the goods from the premises; (4) if the grantor fails, without reasonable excuse, to produce to the grantee, on demand in writing, his last receipts for rent, rates, and taxes; and (5) if execution is levied against the goods of the grantor under any judgment (*c*). By the same statute (*d*) it is further provided that, after seizure, the goods shall not be sold or removed for five days; during which period the grantor may, if the cause for seizure no longer exists, apply to the court to restrain a sale or removal (*e*).

The statutory provisions with regard to security

(*a*) Act of 1882, s. 9 (see schedule); *Ex parte Stanford* (1886) 17 Q. B. D. 259; *Peace v. Brooks* [1895] 2 Q. B. 451; *Coates v. Moore* [1903] 2 K. B. 140.

(*b*) Act of 1882, s. 15; *Re*

*Ginger* [1897] 2 K. B. 461.

(*c*) Act of 1882, s. 7.

(*d*) *Ibid.* s. 13.

(*e*) Generally as to the grantor's rights, see *Johnson v. Diprose* [1893] 1 Q. B. 512.

bills, are, as we have hinted, very strict and highly technical. It is of the utmost importance that they should be exactly complied with ; as non-compliance makes the bill altogether void as a disposition of the chattels comprised in it, even as between the grantor and the grantee. In the case, however, of a bill which is not duly registered, or the consideration for which is not truly stated, the grantor may remain liable on the covenant for payment, though the grantee gets no title to the chattels (*a*) ; and the omission to supply a perfect inventory merely renders the bill void, as to any chattels not listed, ‘except as ‘against the grantor’ (*b*). But if such a bill is void by reason of its not being made in the statutory form, it is void *in toto* ; even as regards the covenant for payment (*c*).

The registration of a bill of sale must be renewed every five years (*d*). The Court can, in a proper case, rectify the register and extend the time for registration or renewal (*e*). When a bill is satisfied, the registrar may order a memorandum of satisfaction to be entered on the filed copy.

In what has been hitherto said of transferring chattels, we have supposed the property to be vested in the person who assumes to transfer it. In general, this circumstance is essential to the validity of the transaction ; in accordance with the maxim—*nemo dat quod non habet* (*f*). There are exceptional cases, however, in

(*a*) Act of 1882, s. 8 ; *Heseltine v. Simmons* [1892] 2 Q. B. 547.

(*b*) Act of 1882, s. 4.

(*c*) *Ibid.* s. 9 ; *Davies v. Rees* (1886) 17 Q. B. D. 408 ; *Saunders v. White* [1901]

1 Q. B. 70.

(*d*) Act of 1878, s. 11.

(*e*) *Ibid.* s. 14.

(*f*) *Peer v. Humphry* (1835) 2 A. & E. 495 ; *Lunn v. Thornton* (1845) 1 C. B. 379.



which a man may confer property in chattels, of which he is not himself the owner, and of which he is not even authorised to make a disposition. For, if current coin of the realm be paid over for valuable consideration to an innocent party, his title thereto will be complete ; although it should have been wrongfully obtained by the party who made the payment (*a*). But this is so only when money has been dealt with *as current coin* ; for an order for restitution to the original owner may be made in respect of a coin, such as a five-pound gold piece, which has been sold by the thief as a curiosity (*b*). So, too, a good title may be acquired by transfer from a non-owner in the case of notes of the Bank of England, and of bills of exchange, promissory notes, and other negotiable instruments transferred in regular course (*c*). A good title is also acquired in respect of goods sold in open market (*market overt*) (*d*) ; except that, even in such case, stolen goods revert to the original owner, when the thief has been prosecuted to conviction (*e*). As regards *choses in action* which are not negotiable instruments, *e.g.*, the majority of shares, stocks, and securities issued by companies and local authorities, any purported transfer of these by a person who is not the true owner is, of course, ineffectual to pass the title to them (*f*). It may, however, happen that when a company or similar body has registered a transfer and issued a certificate in pursuance of it,

(*a*) *Miller v. Race* (1791) 1 Burr. 452.

(*b*) *Moss v. Hancock* [1899] 2 Q. B. 111.

(*c*) *Picker v. London and County Banking Co.* (1887) 18 Q. B. D. 515 ; *London and County Banking Co. v. River Plate Bank* (1888) 20 Q. B. D. 232 ; 21 Q. B. D. 535 ; *Simmons v. London Joint*

*Stock Bank* [1892] A. C. 201.

(*d*) See *post*, ch. v. s. iii. (pp. 165–166).

(*e*) *Hargreave v. Spink* [1892] 1 Q. B. 25 ; *Clayton v. Le Roy* [1911] 2 K. B. 1031 ; Sale of Goods Act, 1893, s. 24.

(*f*) *Crouch v. Crédit Foncier* (1873) L. R. 8 Q. B. 374.

it is estopped from denying the title of the holder of the certificate (a). And by the Forged Transfers Acts, 1891 and 1892, companies and local authorities may, as regards such shares, stocks, and securities, make compensation for any loss arising from a transfer in pursuance of a forged transfer, or of a transfer under a forged power of attorney. And the company or authority paying such compensation is remitted to all the rights and remedies of the person compensated, against the person liable for the loss.

(a) *Balkis Consolidated Company v. Tomkinson* [1893] A. C. 396.

## CHAPTER V.

## OF TITLE BY CONTRACT.

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A CONTRACT is not, strictly speaking, in itself a title to things personal or other property. Contracts give rise directly to rights *in personam*, that is to say, rights to compel another person to do or not to do something, (*i.e.*, rights which, in the language of jurisprudence, are commonly called 'obligations'), and only indirectly to rights *in rem* (that is to say, rights in the nature of property). In a certain sense, however, every right under a contract may perhaps be regarded as a kind of *chose in action*; and in many cases a contract in itself constitutes, or incidentally involves, an assignment of property—as in the case of an actual loan of money, or an agreement for the sale of specific goods ready for delivery. Further, it may be said that every contract for the sale or disposition of property, if and so far as an action for specific performance of it would successfully lie, amounts in equity to an assignment of such property, and effectually vests in the person in whose favour it is made an equitable title to such property (*a*). It is therefore not inappropriate, and is in any case convenient, in this portion of the present work, to consider the legal nature and effect of contracts; particularly those which involve dispositions of, or affect the title to, chattels personal.

(*a*) *Lysaght v. Edwards* Ch. D. 9; *Rafferty v. Schofield* (1876) 2 Ch. D., at p. 506; [1897] 1 Ch. 937.  
*Walsh v. Lonsdale* (1882) 21

For this purpose, it is proposed in this chapter to deal in the first place with the rules of law relating to contracts in general ; and in the next place to examine in greater detail certain particular classes of contracts.

## SECTION I.—ON CONTRACTS IN GENERAL.

### Sub-section (1).—*Definition and essentials of a contract.*

A *contract* is an agreement enforceable at law, and giving rise to obligations between the parties. The term ‘agreement,’ although frequently used as synonymous with the word ‘contract,’ is really an expression of greater width of meaning and less technicality. Every contract is an agreement ; but not every agreement is a contract. In its colloquial sense, the term ‘agreement’ would include any arrangement between two or more persons intended to affect their relations (whether legal or otherwise) to each other. An accepted invitation to dinner, for example, would be an agreement in this sense ; but it would not be a contract, because it would neither be intended to create, nor would it in fact create, any legal obligation between the parties to it. Further, even an agreement which is intended to affect the legal relations of the parties does not necessarily amount to a contract in the strict sense of the term. For instance, a conveyance of land or a deed of gift of a chattel, though involving an agreement, is, properly speaking, not a contract ; because its primary legal operation is to effect a transfer of property, and not to create an obligation. Similarly, the marriage ceremony constitutes an agreement between the parties to it ; but its only direct legal result is to create the *status* of husband and wife. In cases of this kind, however, obligations are often incidentally or consequentially created, either by implication of law or otherwise ;

so that it is therefore sometimes difficult to draw precisely the line between contracts, strictly so-called, and other agreements which affect the rights of the parties. Marriage (partly because questions of marriage were long dealt with by other courts than the common law courts) stands definitely apart from ordinary contracts, and is dealt with elsewhere (*a*). Transactions in the nature of conveyances are harder to separate from contracts; and much that will here be said in respect of contracts is applicable, with more or less modification, to such transactions.

The following are the essential elements of a valid contract in English law.

- (1) There must be an offer by one party to another accepted by that other (*b*).
- (2) There must be an intention to affect the legal relations of the parties, in such a way as to give rise to an obligation or obligations between them.
- (3) Either there must be valuable consideration on both sides, or else the contract must be embodied in a deed.
- (4) In certain cases, for purposes of evidence or otherwise, certain common law or statutory requirements as to form or otherwise must be complied with, in order to render the contract enforceable.
- (5) The parties must enjoy legal capacity to contract.

(*a*) See *post*, bk. iii. ch. ii. (pp. 389–405).

(*b*) The analysis of contract into offer and acceptance is impossible in a few cases; as where an instrument is engrossed in duplicate, and each part is executed by one of the parties nearly at the same time, and

without the knowledge of the other. And it is clear that a unilateral promise under seal is binding without communication to or acceptance by the promisee; subject to the latter's power to repudiate (See Pollock, *Contracts* (7th ed.), pp. 6, 7, 50). But these are exceptional cases.

(6) The subject-matter of the contract must be lawful.

(7) There must be real agreement between the parties (*a*).

In the following sub-sections, we propose separately to consider each of these elements in some detail, and to examine the chief rules affecting each.

Sub-section (2).—*Offer and Acceptance.*

*Offer.*—An offer may be made by one person to another in any manner ; either by writing, words, or conduct. But it is essential, if it is to form the basis of a contract, that it should be communicated in some way to such other person. Usually, of course, it is made by express words or writing ; and such cases involve little difficulty. But it is equally effectual if deducible from some unequivocal act or conduct of a person (*b*). For instance, if a cabman plying for hire takes up a passenger, no word need be spoken on either side ; yet there is a complete offer and acceptance implied from the conduct of the parties. Again, an offer need not be addressed to any specific individual ; for instance, it may be contained in a general advertisement in a newspaper (*c*).

*Acceptance.*—As regards acceptance, this also may take place by express words or writing, or by conduct. For instance, in the illustration above referred to, the fact of the passenger entering a public conveyance would be a sufficient acceptance of the driver's offer to carry him, implied from his (the driver's) conduct in plying for hire. Again, if a tradesman sends goods on approval to the house of a person who retains and uses the goods, there is an implied acceptance of the goods and a corresponding liability to pay the price specified, if

(*a*) But see note on p. 124.

(*c*) *Carlill v. Carbolic Smoke*

(*b*) *Crears v. Hunter* (1887)

*Ball Co.* [1893] 1 Q. B. 269.

19 Q. B. D. 341.

any, or, if none, a reasonable price (a). Difficult questions as to the limits of implied acceptance often arise in connection with what may, for convenience' sake, be called 'ticket cases.' Very many contracts at the present day, such as those with railway and similar companies, are made by the delivery by one party to another of a ticket or document in a common form embodying certain terms and conditions. The delivery of such a ticket really constitutes the offer of the party delivering it; and the other party, by taking the ticket, implicitly accepts such offer. If the latter party is aware of the nature of the terms and conditions stated on the ticket, and they are not fraudulently misleading, or even if he knows of their existence, although he may be ignorant of their exact effect, he is, in most cases, held to be bound by them, on the ground of implied acceptance (b).

Another peculiar class of cases is that of advertisements, by which something is promised by the advertiser in return for some act. It is clear that any person performing the act, with knowledge of the advertisement and an intention to take advantage of it, will be deemed implicitly to have accepted the offer contained in it (c). And there has been held to be a binding contract in such a case; where the act is done with knowledge of the offer, though without the motive of taking advantage of it (d).

As a general rule, an acceptance of an offer ought to

(a) *Hart v. Mills* (1846) 15 M. & W. 87.

(b) *Watkins v. Rymill* (1883) 10 Q. B. D. 178; *Richardson & Co. v. Rowntree* [1894] A. C. 217; *Skrine v. Gould* (1912) 29 T. L. R. 19.

(c) *Carlill v. Carbolic Smoke Ball Co.* (1893) 1 Q. B. 269.

(d) *Williams v. Carwardine*

(1833) 4 B. & Ad. 621. In *Gibbons v. Proctor* (1892) 64 L. T. 594, it was held that there was a binding contract even where the act was done in ignorance of the offer. But this decision is generally regarded as contrary to principle.

be notified to the offeror ; and in such cases the contract will be complete only when the acceptance is so notified. But this doctrine is subject to the rule, that as notification of acceptance is required for the benefit of the person who makes the offer, the latter may dispense with notice to himself, if he thinks fit. And therefore, if the offeror expressly or implicitly indicates a particular mode of acceptance as sufficient, it is enough for the offeree to follow the indicated mode of acceptance. Thus, where the offeror expressly or by implication indicates in the offer that it will be sufficient to act on the offer without communicating acceptance to himself, it will be a sufficient acceptance, if the offeree so acts without notification (*a*). Upon the same principle, it is now a well established rule of law, that an acceptance by letter is complete as soon as it is posted, in cases where, according to the ordinary usages of mankind, the post may be used as a means of communicating the acceptance (*b*) ; and, similarly, an acceptance by telegram is complete as soon as the telegram is handed in for despatch (*c*). It is, therefore, too late to revoke an offer if a letter of acceptance has been posted ; even though the notice of revocation should in fact reach the offeree before the letter of acceptance reaches the offeror. And a posted acceptance makes a binding contract ; even though it may be delayed or lost in the post (*d*). But delivery to a postman is not equivalent to posting (*e*).

*Lapse and revocation of an offer.*—An offer lapses if not accepted within the time specified by the offeror, or, in any case, within a reasonable time (*f*). It lapses

(*a*) *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 269. (*e*) *ance Co. v. Grant* (1879) 4 Ex. D. 216.

(*b*) *Henthorn v. Fraser* [1892] 2 Ch. 27. (*e*) *In re London & Northern Bank* [1900] 1 Ch. 220.

(*c*) *Cowan v. O'Connor* (1888) 20 Q. B. D. 640. (*f*) *Ramsgate Hotel Co. v. Montefiore* (1866) L. R. 1 Ex.

(*d*) *Household Fire Insur-* 109.



also by the death of either party before acceptance (*a*). It is revoked if, at any time before acceptance, the offeror communicates to the offeree notice of revocation (*b*). And it has been held, that even notice received from a third party of the revocation, or of circumstances clearly negating the continued subsistence of the offer, is sufficient revocation to preclude subsequent acceptance (*c*). But no offer can be revoked when once validly accepted; and no revocation has any effect unless actually communicated to the offeree. The mere posting of a letter of revocation is not equivalent to revocation (*d*). It is to be observed, however, that even an express promise to keep an offer open is not binding unless such promise is contained in a valid contract, as being made either by deed or for valuable consideration (*e*). In the latter case, such contract is commonly known as ‘an agreement for an option,’ and is a familiar incident in modern business life (*f*).

*Identity of terms.*—Finally, as regards acceptance, it is important to remember, that, to be effective, it must be identical with the terms of the offer, and must be absolute. To take a simple illustration; if A. says to B. “I will sell you my horse for 100*l.*,” and B. replies: “I accept, and will give you 90*l.* for “it,” there is no *consensus ad idem*, and therefore no contract (*g*). Again, if B. accepts the offer at the price mentioned by A., but upon some condition not referred

(*a*) *Bagel v. Miller* [1903] 2 K. B. 212. (1880) 5 C. P. D. 344.

(*b*) *Offord v. Davies* (1862) 12 C. B. N. S. 748. (*e*) See *Offord v. Davies*, *Dickinson v. Dodds*, and *Henthorn v. Fraser*, *ubi. sup.*

(*c*) *Dickinson v. Dodds* (1876) 2 Ch. D. 463; *Cartwright v. Hoogstoel* (1911) 105 L. T. 628. (*f*) *Bruner v. Moore* [1904] 1 Ch. 305.

(*g*) *Hyde v. Wrench* (1840) 3 Beav. 334.

(*d*) *Byrne v. Van Tienhoven*

to by A., there is no contract (a). Very difficult cases on this point frequently arise, where the acceptance of an offer refers to a formal document being prepared, or to the approval of the contract by the acceptor's solicitor. It is impossible here to discuss this class of cases; but the general test applicable is, whether the acceptance is intended to be final, or conditional on some further event. If it is made expressly 'subject to' some further event, it is, *primâ facie*, a conditional acceptance; and there is no binding contract. But an agreement to embody the terms agreed upon in a more formal document, is not necessarily inconsistent with there being a complete and concluded contract (b).

Sub-section (3).—*Intention to create legal relations.*

This is so obvious an essential that it requires little comment. There are very many engagements made in the ordinary course of life, which are agreements in the wide sense of the term, but are intended merely as arrangements of a social or friendly nature, and are in no way intended to bind the parties legally. For instance, as already stated, an accepted invitation to dinner could not reasonably be regarded as a contract. And so, an extravagant offer, made in jest or not intended to be taken seriously, would not usually be binding. It is possible that cases may occur somewhat near the border-line; and, if so, it is a question of fact in each case, whether a legal contract was or was not intended (c).

Incidentally here may be mentioned the necessity of

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| <p>(a) <i>Hutchinson v. Bowker</i> (1839) 5 M. &amp; W. 535; <i>Jones v. Daniel</i> [1894] 2 Ch. 332.</p> <p>(b) <i>Winn v. Bull</i> (1878) 7 Ch. D., at p. 32; <i>Rossiter v. Miller</i> (1878) L. R. 3 App. Ca. 1124; <i>Page v. Norfolk</i> (1894) 70 L. T. 781; <i>Chipperfield v.</i></p> | <p><i>Carter</i> (1895) 72 L. T. 487; <i>Simpson v. Hughes</i> (1897) 76 L. T. 237; <i>Filby v. Hounsell</i> [1896] 2 Ch. 737.</p> <p>(c) <i>E.g., Week v. Tibold</i> (1606) Roll. Abr. 6; <i>Noy</i>, 11; <i>Carlill v. Carbolic Smoke Ball Co.</i> [1893] 1 Q. B. 256.</p> |
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distinguishing between mere information furnished in response to a request, and a definite offer intended (if accepted) to form a contract. In the former case there is of course no contract (a).

Sub-section (4).—*Consideration or Seal.*

For any contract to be enforceable at law, it is essential either that it should be made under seal, or else that it should be made for valuable consideration.

By a contract under seal is meant one which is embodied in a deed, *i.e.*, a document in writing or print upon paper or parchment, sealed and delivered by the party against whom it is sought to be enforced (b).

A promise contained in a unilateral deed is binding on the party making it as soon as the deed is executed, without any communication to or acceptance by the other party; and such promise does not lapse (as a mere offer would) by the death of the covenantor before such communication or acceptance (c). Nor can the person who executes the deed revoke it, or prevent it from operating, by any act on his part, such as destroying it (d). But if, when the deed is communicated to the person in whose favour it is made, the latter repudiates it, the deed will be of no effect, just as if it had never been made (e).

It follows from what has been already stated, that a promise by deed is enforceable, although it is purely voluntary and unaccompanied by any benefit to the promisor. Hence, a promise to make a gift of anything

(a) *Harvey v. Facey* [1893] A. C. 552. *ham* (1867) L. R. 2 H. L. 296.

(b) Co. Litt. 35 b, 171 b. (d) *Sear v. Ashwell* (1739) 3 Swanst. 411 (n).

(For a fuller account of deeds, see *ante*, bk. ii. pt. i. ch. xviii.). (e) *Butler's and Baker's Case* (1592) 3 Co. Rep. 26;

(c) *Hall v. Palmer* (1844) 13 L. J. Ch. 352; *Xenos v. Wick-*  
*Xenos v. Wickham*, *ubi sup.*

is not binding unless under seal (*a*) ; for instance, it has been held that a promise, not made by deed, to subscribe to a charitable or philanthropic object, is unenforceable (*b*).

There are various other special cases in which, by common law or statute, a contract must be under seal. But these are irrespective of the question of consideration ; and are, therefore, more appropriately dealt with hereafter (*c*).

Every contract not under seal must be based upon 'valuable consideration' (*d*). Expressed in simple terms, this rule means that, in order that a party to the contract may be legally bound, he must have got something in return for his own promise. "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other" (*e*).

Thus, the following have been held to be sufficient considerations to support a promise : marriage, or a promise to marry the promisor (*f*) ; forbearance to sue on, or compromise of, a doubtful claim ; labour or trouble undertaken ; anything done at the request or invitation of the promisor and in reliance on the promise, even though it may not apparently benefit the promisor in the least (*g*).

(*a*) *Rann v. Hughes* (1778) 7 T. R. 350 ; *Cochrane v. Moore* (1890) 25 Q. B. D. 57.

(*b*) *Creed v. Henderson* (1885) 54 L. J. Ch. 811. The promise in this case would also have been unenforceable for want of a sufficient memorandum.

(*c*) See *post*, subs. (5), p. 100.

(*d*) As to contracts made in a country, the law of which

does not require consideration, see *Re Bonacina* [1912] 2 Ch. 394.

(*e*) *Currie v. Misa* (1875) L. R. 10 Ex. 153 ; 1 App. Ca. 554.

(*f*) *Synge v. Synge* [1894] 1 Q. B. 466.

(*g*) *Bainbridge v. Firmstone* (1838) 8 A. & E. 743 ; *Shadwell v. Shadwell* (1860) 9 C. B. (N.S.) 159.

The following points with regard to consideration deserve particular attention.

(i) Consideration is either *executed* or *executory*. Executed consideration is any act or forbearance completely performed by the promisee in return for the promise, and contemporaneous with it ; as, for instance, the transfer of the ownership of goods sold in return for the purchaser's promise to pay for them, in case of a sale of goods (*a*), or the performance of an act for which a reward is offered (*b*). Executory consideration is a promise to act or forbear, given in return for the promise of which it forms the consideration ; as, for instance, a promise to transfer the ownership of goods in return for the purchaser's promise to pay, in the case of an agreement to sell (*a*), or the promise to perform services in return for a promise to pay for them. In all cases of this latter kind, it is obvious that each promise forms an executory consideration for the promise of the other party.

(ii) Consideration need not be *adequate*. Provided it is real and legally appreciable, it is recognised by law, however slight its apparent value may be. Thus, the mere handing over of a document was held to be a sufficient consideration for a promise to pay a large sum of money ; even though the document turned out to be of no value (*c*). It has even been held, by the Court of Appeal, that the sending of a letter to the financial editor of a newspaper, asking for advice, is a valuable consideration for an undertaking on the part of the proprietor that reasonable care shall be used in giving the advice (*d*). If, however, consideration is grossly inadequate, the fact may, in some cases, be strong

(*a*) Sale of Goods Act, 1893,  
s. 1 (3).

(*b*) *Carlill v. Carbolic Smoke  
Ball Co.* [1893] 1 Q. B.  
256.

(*c*) *Haigh v. Brooks* (1839)  
10 A. & E. 309.

(*d*) *De la Bere v. Pearson*  
[1908] 1 K. B. 280.

evidence of fraud; particularly where the surrounding circumstances are suspicious (*a*).

(iii) An act or forbearance to which one is already bound, either by a general rule of law, or by a previous contract with *the other party*, is regarded as being of no value in the eye of the law, and is therefore no consideration for a promise. A promise of such act or forbearance is equally incapable of being a consideration for a promise (*b*). For instance, if A. owes B. 100*l.*, and B. subsequently promises to take 50*l.* in full satisfaction of the debt, or to take 50*l.* down and the rest by future monthly instalments, then, whether A. pays the 50*l.*, or merely promises to pay it, B.'s promise is not binding (*c*). If, however, the smaller sum is agreed to be paid at an earlier date than that originally agreed, or at a different place, the promise will be binding. So, also, if something is accepted of less value, but of a different nature from that owed, there will be sufficient consideration; for instance, if B. in the above case agreed to accept from A. in lieu of the 100*l.* "a horse or a canary or a tomtit" (as JESSEL, M.R., once facetiously observed) (*d*), or, it would seem, merely the promise of one of such articles, or a negotiable instrument (such as a cheque) for a smaller sum (*e*).

The doctrine that the performance of, or promise to perform, an outstanding contract with a stranger, *i.e.*, a person other than the promisor, is no considera-

(*a*) *Coles v. Trecothick* (1804) 9 Ves. 246.

(*b*) *Stilk v. Myrick* (1809) 2 Camp. 317; *Collins v. Godefroy* (1831) 1 B. & Ad. 950.

(*c*) *Cumber v. Wane* (1719) 1 Strange, 426; *Foakes v. Beer* (1884) L. R. 9 App. Ca. 605; *Underwood v. Underwood* [1894] P. 204.

(*d*) *Couldery v. Bartrum* (1881) 19 Ch. D., at p. 399.

(*e*) *Goddard v. O'Brien* (1882) 9 Q. B. D. 37; *Bidder v. Bridges* (1887) 37 Ch. D. 406; see, however, *Day v. McLea* (1889) 22 Q. B. D. 610; *Hirachand Punamchand v. Temple* [1911] 2 K. B., at p. 340.

tion for a promise, though supported by learned and weighty opinion, appears to be inconsistent with the decisions of the English Courts (*a*).

(iv) The consideration must not be *illegal* or *immoral*. This rule is only part of the general rule, which invalidates all contracts having an illegal or immoral purpose. Even a contract under seal is vitiated by the existence of an illegal or immoral consideration (*b*).

(v) The consideration must not be something already past. For instance, if A., having already sold B. a horse, afterwards warrants the horse to be sound, B. cannot sue on the warranty; because A. in fact gains no advantage or benefit in return for his promise, and B. suffers no detriment (*c*).

There are three apparent exceptions to the rule that a past consideration is no consideration. (1) Where one person does something at another's request, and subsequently the latter promises something in consideration of the act done, this is said to be binding (*d*). But in such cases the true view seems to be, that the request itself raises an implied promise to pay for the service what it is worth; and the subsequent promise is merely evidence of the value of the service (*e*). (2) Where B. has voluntarily done what A. was legally bound to do, and A. subsequently, in consideration of such act, promises B. something, the promise has in some cases been held binding (*f*). But these cases (so

(*a*) *Bagge v. Slade* (1616)  
3 Bulst. 162; *Shadwell v.*  
*Shadwell* (1860) 9 C. B. (N.S.)  
159; *Scotson v. Pegg* (1861)  
6 H. & N. 295.

(*b*) *Fetherstone v. Hutchin-*  
*son* (1590) Cro. Eliz. 199;  
*Collins v. Blantern* (1766)  
2 Wils. 341.

(*c*) *Roscorla v. Thomas* (1842)  
3 Q. B. 234.

(*d*) *Lampleigh v. Braithwait*

(1616) Hob. 105.

(*e*) *Kennedy v. Brown* (1863)  
13 C. B. (N.S.) 677; *Stewart*  
*v. Casey* [1892] 1 Ch., at  
p. 115.

(*f*) *Watson v. Turner* (1767)  
Buller, N. P. 147; *Atkins v.*  
*Banwell* (1802) 2 East, 505;  
*Wing v. Mill* (1817) 1 B. &  
Ald. 105; *Paynter v. Wil-*  
*liams* (1833) 1 C. & M. 810.

far as they were rightly decided) have been explained as cases of acts done at the request of the promisor, which acts formed the consideration for an original implied promise to pay a reasonable remuneration (*a*). (3) A promise to pay a debt, the right of action in respect of which is barred under the Statutes of Limitation by lapse of time, will revive the right of action, if duly evidenced by writing. But in such cases it is the original, and not the fresh, promise which is actionable (*b*).

(vi) It has long been the accepted doctrine, that consideration must 'move from the promisee,' *i.e.*, the benefit must be furnished or the detriment suffered by the person to whom the promise is made, and who seeks to enforce it (*c*). But a recent case in which the liquidator of a company was held entitled to the benefit of an agreement to which he was a party, but without furnishing any consideration, and whereby all the directors mutually agreed to forgo the fees to which they were entitled, is inconsistent with this principle (*d*).

Sub-section (5).—*Special Requirements as to form, &c.*

*Stamping*.—As a general rule, no contract made in writing can be put in evidence in an action, unless it is duly stamped in accordance with the requirements

(*a*) Selwyn, N. P. I, 51.

(*b*) See *post*, bk. v. ch. ix.

(*c*) *Tweddle v. Atkinson* (1861) 1 B. & S. 393.

(*d*) *West Yorkshire Darracq Agency v. Coleridge* [1911] 2 K. B. 326. The earlier cases on compositions with creditors are not inconsistent with the doctrine (*e.g.*, *Good v. Cheeseman* (1831) 2 B. & Ad. 328; *Boyd v. Hind* (1857) 1 H. & N. 938). *Slater v. Jones* (1873) L. R. 8 Ex. 186,

was decided under the Bankruptcy Act, 1869; and the remarks of KELLY, C.B. are merely *obiter*. *Hirachand Punamchand v. Temple* [1911] 2 K. B. 330, is perhaps also inconsistent with the doctrine; but the reasons given by the members of the Court of Appeal for the decision are so numerous, that it is difficult to say what was decided.



of the revenue laws (*a*). The want of a stamp does not, however, usually invalidate a contract; and an unstamped agreement may be put in evidence on payment of the unpaid duty, and a further sum by way of a penalty (*b*).

*Seal*.—Some contracts, quite apart from the question whether or not they are made for valuable consideration, must be made by deed under seal. By the common law, corporations aggregate can only contract under seal, except in the following cases, *i.e.*, (1) where the contract relates to matters of trifling importance, daily occurrence, or urgent necessity (*c*); (2) where the contract is made by a trading corporation in the ordinary course of its business (*d*); or (3) by companies incorporated under the Companies (Consolidation) Act, 1908, and similar enactments (*e*); and (4) where goods have been supplied or work done at the request of the corporation for the purposes for which the corporation exists, the corporation will be liable to pay for such goods or work, although there is no contract under seal (*f*). So, too, a corporation which has performed the whole of its part under a contract not under seal, may sue the other party (*g*). But where the requirement of a seal is imposed by statute, even complete performance will give no right of action against the corporation (*h*).

(*a*) Stamp Act, 1891, ss. 22, 23, and 59, and the Schedule to the Act.

(*b*) *Ibid.* ss. 14, 15.

(*c*) *Clarke v. Cuckfield Union* (1852) 21 L. J. Q. B. 349; *Nicholson v. Bradfield Union* (1866) L. R. 1 Q. B. 620.

(*d*) *South of Ireland Colliery Co. v. Waddle* (1869) L. R. 4 C. P. 617.

(*e*) S. 76. And see the repealed Companies Act, 1867,

s. 37.

(*f*) *Lawford v. Billericay Rural District Council* [1903] 1 K. B. 772.

(*g*) *Fishmongers' Co. v. Robertson* (1842) 5 M. & G. 131.

(*h*) *Hunt v. Wimbledon Local Board* (1878) 4 C. P. D. 48; *Young v. Leamington R. Corporation* (1883) L. R. 8 App. Ca. 517; Public Health Act, 1875, s. 174. There are

*Writing.*—Simple contracts for valuable consideration are not required to be in writing by the common law ; but there are many cases in which writing is required by special statutes. The following are the chief instances : (1) bills of exchange and promissory notes, by the Bills of Exchange Act, 1882 ; (2) agreements between masters and seamen, by the Merchant Shipping Act, 1894 ; (3) contracts of marine insurance, by the Stamp Act, 1891, and the Marine Insurance Act, 1906 ; (4) special contracts of carriage limiting the liability of railway companies, by the Railway and Canal Traffic Act, 1854 ; (5) contracts for the sale of goods of the value of 10*l.* and upwards, by the Sale of Goods Act, 1893 ; and (6) contracts within section 4 of the Statute of Frauds (*a*).

Of these cases, two only, for present purposes, require special comment. As regards contracts for the sale of goods, the subject is fully dealt with hereafter (*b*). Here, however, it is necessary to state with

also a number of assurances (*i.e.*, conveyances, rather than contracts) required by statute to be by deed. The chief instances are the following : transfers of shares under the Companies Clauses Act, 1845 ; leases of land for more than three years, and conveyances of any greater interest in lands under the Statute of Frauds and the Real Property Act, 1845. But *contracts* for the sale of shares or of land, or for the granting of a lease, do not need to be made under seal. They may be made in writing without seal, or, in the case of shares, even by word of mouth (*Tempest v. Kilner* (1845) 3 C. B. 249 ;

*Boulby v. Bell* (1846) *ibid.* 254).

(*a*) Writing is also required for acknowledgments of debts and liabilities barred by the Statutes of Limitations (*post*, bk. v. ch. ix.), and for assignments of (*a*) debts and legal choses in action under the Judicature Act, 1873, s. 25, (*b*) shares in companies registered under the Companies (Consolidation) Act, 1908, and similar earlier Acts, (*c*) copyright under the Copyright Act, 1911. But none of these transactions are really contracts.

(*b*) *Post*, ch. v. s. iii. (p. 162).

some care the requirements of the fourth section of the Statute of Frauds.

This celebrated enactment provides, that no action shall be brought upon any of five specified classes of contracts, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person by him lawfully authorised."

The contracts in question are these:—(1) any special promise by an executor or administrator to answer damages out of his own estate; (2) contracts of suretyship or guarantee (*a*); (3) 'agreements in consideration of marriage' (*i.e.*, agreements to give or settle money or property upon a marriage, not mere promises to marry); (4) agreements 'not to be performed within a year' (*i.e.*, not capable of being performed on either side within a year (*b*)); and (5) contracts relating to land or any interest in land, *i.e.*, agreements for the sale or letting of land, or in any way directly concerning or affecting land (*c*).

The decisions upon the interpretation of the fourth section of the Statute of Frauds have been so numerous as to justify the existence of a doubt whether the section has not caused more loss than it has prevented; but we must here content ourselves with the barest summary of the rules deduced from them.

(1) There must be a note or memorandum of the

(*a*) See ch. v. s. vii. (pp. 201–205), and *Harburg, &c. Co. v. Martin* [1902] 1 K. B. 778; *Davys v. Buswell* [1913] 2 K. B. 47.

(*b*) *Peter v. Compton* (1694) Skin. 353; *Donellan v. Read* (1832) 3 B. & Ad. 899; *Mil-som v. Stafford* (1899) 80 L. T. 590; *Pearce v. Gardner*

[1897] 1 Q. B. 688; *Reeve v. Jennings* [1910] 2 K. B. 522; *Prested Miners, &c. Co. v. Garner* [1911] 1 K. B. 425; *Hanau v. Ehrlich* [1912] A. C. 39.

(*c*) *Angell v. Duke* (1874) L. R. 10 Q. B. 174; *Boston v. Boston* [1904] 1 K. B. 124.

contract in writing, which need not, necessarily, consist of a single document; but, if it consists of several documents, the documents must be clearly referable to and connected with each other (*a*).

(2) The parties must be described either by name, or in some other way, sufficiently clearly to identify them (*b*).

(3) The subject-matter must be described so as to be identifiable (*c*).

(4) The consideration, except in the case of contracts of suretyship and guarantee (*d*), must be stated, or capable of reasonable inference from the memorandum (*e*).

(5) All other material terms must appear, expressly or by reasonable inference, in the memorandum; *e.g.*, the date of commencement of a lease (*f*). But where a written offer prescribes a time for acceptance, the time may be extended by word of mouth (*g*).

(6) The memorandum must be signed by the party against whom the agreement is sought to be enforced, or by his agent (*h*). It is immaterial whether the party who is bringing the action has signed or not (*i*).

(7) It is not necessary that the memorandum should be contemporaneous with the contract, *i.e.*, it is only evidence, not the contract itself. But it must be in

(*a*) *Boydell v. Drummond* (1809) 11 East, 142; *Pearce v. Gardner* [1897] 1 Q. B. 688; *Jones v. Joyner* (1900) 82 L. T. 768.

(*b*) *Coombs v. Wilkes* [1891] 3 Ch. 77; *Pattie v. Anstruther* (1894) 69 L. T. 174; *Carr v. Lynch* [1900] 1 Ch. 613.

(*c*) *Shardlow v. Cotterell* (1881) 20 Ch. D. 90; *Plant v. Bourne* [1897] 2 Ch. 281.

(*d*) Mercantile Law Amendment Act, 1856, s. 3.

(*e*) *Wain v. Warlters* (1804) 5 East, 10; *Re Eyre* (1895) 72

L. T. 585.

(*f*) *Humphery v. Conybeare* (1899) 80 L. T. 40; *Re Alexander's Timber Co.* (1901) 70 L. J. Ch. 767; *Elliott v. Roberts* (1912) 107 L. T. 18; *Curtis v. B. U. R. T.* (1912) 28 T. L. R. 585.

(*g*) *Morrell v. Studd* [1913] 2 Ch. 648.

(*h*) *Sims v. Landray* [1894] 2 Ch. 318; *Bell v. Balls* [1897] 1 Ch. 663; *Rosenbaum v. Belson* [1900] 2 Ch. 267.

(*i*) *Reuss v. Picksley* (1866) L. R. 1 Ex. 342.

existence before any action is brought to enforce the contract (*a*).

There are, moreover, certain exceptional cases to which the Statute of Frauds does not apply, *e.g.*, (1) in sales by order of the Court (*b*); (2) where the defendant does not expressly plead that he relies upon the statute (*c*); (3) where the execution of a memorandum has been prevented by the defendant's fraud (*d*); and (4) where there is a valid oral agreement followed by part performance.

The last of these cases requires a short explanation. The doctrine of *part performance* is, in origin, an equitable one; though it is now applicable in every branch of the Supreme Court, and also in County Courts, so far as these have equitable jurisdiction (*e*). It amounts, in effect, to this, that, where one of the parties, relying on the existence of an oral contract, has, at the request or, at least, with the assent, of the other, done certain acts, exclusively referable to the contract, in fulfilment of his obligations thereunder, whereby he has been prejudiced or incurred liabilities, the other party to the contract will not, even though he pleads the Statute of Frauds, be allowed to escape entirely, but, if the contract is one of which specific performance is capable of being decreed, will be ordered to perform it accordingly. But in order that any acts may constitute part performance in this sense, the following conditions must be satisfied (*f*): (1) the acts

(*a*) *Lucas v. Dixon* (1889) 22 Q. B. D. 357. *Smith* [1891] 1 Ch., at p. 389.

(*b*) *A.-G. v. Day* (1749) 1 Ves. Sen. 218; *Blagden v. Bradbear* (1806) 12 Ves. 468; (1719) 1 Eq. Abr. 20; Pre. Ch. 526; *Wood v. Midgley* (1854) 5 D. M. & G. 41.

*Lord v. Lord* (1827) 1 Sim. 503. The doctrine appears to rest merely on *dicta*. (*c*) *Foster v. Reeves* [1892] 2 Q. B. 255.

(*e*) Order XIX. rr. 15, 20; Order XXV. r. 1; *James v. Maddison v. Alderson* (1883) L. R. 8 App. Ca., at pp. 476 *et seq.*

must be such as to be unequivocally referable to the alleged contract ; (2) such as to render it a fraud in the defendant to take advantage of the contract not being in writing ; (3) the contract must be such as would, if in writing, be specifically enforceable by the Court (a) ; and (4) there must be proper oral evidence of the contract which is let in by the acts of part performance.

The following acts have been held to be sufficient part performance for the purposes of this doctrine, *viz.* : taking possession of property, continuance of a tenant in possession at an increased rent, expenditure of money in buildings or improvements, and delivery of title-deeds under a parol agreement for mortgage (b).

On the other hand, the following acts have been held to be insufficient for the purpose, *viz.* : acts ancillary or introductory to completion of the contract, payment of purchase money on a sale, marriage, payment of rent under an oral agreement for a lease, and continuance in the service of an employer (c).

It must be remembered, moreover, that failure to comply with the requirements of the statute in the matter of writing does not render a contract *void* or even *voidable* ; it merely prevents an action from being brought upon it. For any other purpose the contract is a subsisting one, and may be proved. Thus, when a written contract is sued upon, it is open to the defendant to show that such written contract in fact forms only part of the whole transaction, the rest of which is oral (d).

(a) *McManus v. Cooke* (1887) 35 Ch. D. 681.

(b) *Lester v. Foxcroft* (1700) Colles, 108 ; *Ungley v. Ungley* (1877) 5 Ch. D. 887 ; *Miller v. Sharp* [1893] 1 Ch. 622.

(c) *Britain v. Rossiter* (1879)

11 Q. B. D. 123 ; *Maddison v. Alderson* (1883) L. R. 8 App. Ca. 467.

(d) *Jervis v. Berridge* (1873) L. R. 8 Ch. 351. See *Lincoln v. Wright* (1859) 4 De G. & J. 16.

*Other requirements.*—By statute in certain cases there are certain other requirements. For example, bills of sale and transfers of British ships have to be registered in a public register; disentailing deeds and assurances to charities have to be enrolled; and certain contracts with companies have to be filed with the Registrar of Companies. It is not, however, necessary to consider these in detail.

Sub-section (6).—*Legal Capacity of Parties.*

The general rule is: that any person is legally capable of entering into a contract valid by English law, including even foreigners. But there are certain exceptional cases in which such capacity, for some reason, does not exist, or exists only subject to limitations. The chief cases are those of contracts by the following persons, *i.e.*, (1) alien enemies; (2) foreign sovereigns or governments; (3) foreign ambassadors and their suites; (4) convicted felons; (5) infants; (6) married women; (7) lunatics; (8) drunken persons; and (9) corporations. It will be desirable briefly to consider these in order.

(1) *Alien enemies.*—Contracts with alien enemies, if made before the outbreak of war with their state, are in suspense, and not enforceable during the war; but if made during the war, they are void *ab initio*, unless made under licence from the Crown (a).

(2) *Foreign sovereigns.*—Foreign sovereigns or governments can make contracts valid by English law; but such contracts cannot be enforced in our courts against them, except where they voluntarily appear and submit to the jurisdiction (b).

(a) *Willison v. Pattison* (1816) 7 Taunt. 439; *Janson v. Driefontein Mines* [1902] A. C. 484.

(b) *Mighell v. Sultan of Johore* [1894] 1 Q. B. 149; *South African Republic v. Transvaal Railway* [1898] 1

(3) *Foreign ambassadors and their suites*.—The rule last mentioned also applies in this case ; with the possible exception (not clearly decided) that if an ambassador or member of his suite engages in trade, he may be sued here on a contract entered into by him. Subject to this exception, the Diplomatic Privileges Act, 1708, makes ‘null and void’ any writ or other process against such persons. But a contract made by such a person becomes enforceable against him as soon as his privileged status comes to an end (a).

(4) *Convicted felons*.—By the Forfeiture Act, 1870 (b), every convict is made incapable of alienating or charging any property, and of making any contract.

(5) *Infants*.—At common law an infant’s contracts were all voidable at his option, except in certain cases, such as contracts for necessities. This rule is now modified by the Infants Relief Act, 1874, which in effect enacts—(a) that all contracts by infants for money lent or to be lent, or goods supplied or to be supplied, and all accounts stated, shall be absolutely void ; and (b) that no promise made after full age to pay a debt contracted during infancy, and no ratification after full age of a contract made during infancy, shall give any right of action, even though there be a new consideration for such promise or ratification. But this position does not invalidate an independent contract entered into after attaining full age, though to the same effect as one previously entered into during infancy (c) ; and the Act does not render void contracts which before the Act were binding on an infant and not voidable by him.

Ch. 190 ; *Castaneda v. Clydebank Co.* [1902] A. C. 524.

(a) *Musurus Bey v. Gadban* [1894] 1 Q. B. 533.

(b) S. 8.

(c) *Ditcham v. Worrall* (1880) 5 C. P. D. 410. See *Coxhead v. Mullis* (1878) 3 C. P. D. 439.



As the law stands at present, the result may shortly be stated as follows. Generally speaking, contracts made by an infant are in effect unenforceable against him, either as being void *ab initio*, or as being incapable of ratification; although money paid by an infant under such a contract, of which he has had the benefit, cannot be recovered back by him (*a*). But there are several important exceptions, as follows.

(1) An infant is liable to pay a reasonable price for 'necessaries' sold and delivered to him. 'Necessaries' are defined as meaning "goods suitable to the condition "in life of such infant, and to his actual requirements "at the time of sale and delivery." (*b*). It is obvious that many things, such as medicine and reasonable food and clothing, are essentially necessities, whereas articles of mere ornament or luxury, or things with which the infant is already well supplied, would not be 'necessaries' (*c*). But there are many cases on the border line, which have to be decided on the particular facts (*d*). It is immaterial what the tradesman who supplied the goods *thought* as to the age of the person with whom he deals, or as to his position in life or his actual requirements at the time of the sale (*e*); and an infant is not liable on a bill of exchange given in payment of necessities (*f*).

(2) An infant is bound by certain contracts, which are fair and reasonable and unequivocally for his benefit, *e.g.*, a proper contract of apprenticeship or service (*g*).

(*a*) *Valentini v. Canali* (1889) 24 Q. B. D. 166.

(*b*) Sale of Goods Act, 1893, s. 2.

(*c*) *Peters v. Fleming* (1840) 6 M. & W. 42; *Ryder v. Wombwell* (1868) L. R. 4 Ex. 32; *Johnstone v. Marks* (1887) 19 Q. B. D. 509; *Hewlings v. Graham* (1901) 84

L. T. 497; *Nash v. Inman* [1908] 2 K. B. 1.

(*d*) *Glyde Cycle Co. v. Hargreaves* (1898) 78 L. T. 296.

(*e*) *Nash v. Inman*, *ubi sup.*

(*f*) *Re Soltykoff* [1891] 1 Q. B. 413. But consider *Walter v. Everard* [1891] 2 Q. B. 369.

(*g*) *Fellows v. Wood* (1889)

(3) Some contracts are binding on infants by statute; *e.g.*, marriage settlements made with the approval of the Court under the Infants Settlement Act, 1855 (*a*).

(4) An infant's contract which involves proprietary rights, and out of which rights and liabilities arise from time to time, becomes binding on him after majority, unless he expressly repudiates it within a reasonable time, *e.g.*, a marriage settlement by, or a lease of real property or an allotment of shares to, an infant (*b*).

An infant who falsely represents himself as being of age, and thereby induces a person to enter into a contract with him, does not thereby make himself liable upon the contract, and is not 'estopped,' *i.e.*, prevented, in an action upon the contract, from pleading his infancy (*c*). But he incurs an equitable obligation upon the principle that an infant shall not take advantage of his own wrong. Thus, he will not only be ordered to restore property which he has obtained through such misrepresentation (*d*), but may be made to pay the value of goods bought by him upon the strength of such representation, and possibly to repay money borrowed (*e*).

59 L. T. 513; *Clements v. London and North Western Rail. Co.* [1894] 2 Q. B. 482; *Roberts v. Gray* [1913] 1 K. B. 520.

(*a*) The infant must be at least 20 years of age if a male, or 17 if a female; and every exercise of a power of appointment, and every disentailing assurance by an infant tenant-in-tail, contained in such settlement, becomes void if the infant dies under 21.

(*b*) *Baylis v. Dineley* (1815) 3 M. & S., at p. 481; *Cork Ry. v. Cazenove* (1847) 10 Q. B.

935; *Edwards v. Carter* [1893] A. C. 360; *Hamilton v. Vaughan Sherrin Co.* [1894] 3 Ch. 589.

(*c*) *Levene v. Brougham* (1909) 25 T. L. R. 265.

(*d*) *Clarke v. Cobley* (1789) 2 Cox, 173; *Lemprière v. Lange* (1879) 12 Ch. D. 675. (In the last case an infant had obtained a lease of a furnished house. The lease was set aside; but the infant was not made liable for use and occupation.)

(*e*) *Stocks v. Wilson* [1913] 2 K. B. 235. See *Ex parte*

An infant is, at common law, liable in tort, even for a fraud connected with a contract ; unless an action in tort would be in effect merely an indirect way of enforcing the contract (a).

(6) *Married women*.—At common law, with a few exceptions, a married woman could not contract at all. In equity, she was allowed to bind her 'separate estate' by her contracts. Now, by the Married Women's Property Acts, 1882 and 1893, her position is, that she is personally liable for her ante-nuptial debts (b), and that she can, during marriage, enter into any contract, so as to bind her separate property, as if she were a *feme sole*. Such contract binds all her separate property, whether existing at the time of the contract or acquired afterwards, as well as property to which she may become entitled when she is no longer a married woman ; except property which is subject to restraint on anticipation (c). A judgment against a married woman upon a post-nuptial liability, cannot, however, be enforced against her personally, but only against her property (d). But if she is carrying on a trade or business, whether separately from her husband or not, she may now be made bankrupt in the same manner as if she was personally liable (e).

*Unity Joint Stock Mutual Banking Association* (1858) 3 De G. & J. 63 ; *Ex parte Jones* (1881) 18 Ch. D. 109.

(a) *Johnson v. Pye* (1665) 1 Sid. 258 ; *Bristow v. Eastman* (1794) 1 Esp. 172 ; *Jennings v. Rundall* (1799) 8 T. R. 335 ; *Barnard v. Haggis* (1863) 14 C. B. (N.S.) 45 ; *Cowern v. Nield* [1912] 2 K. B. 419.

(b) *Robinson v. Lynes* [1894] 2 Q. B. 577.

(c) See the Act of 1882,

s. 1, and the Act of 1893, s. 1 ; *Hood-Barrs v. Cathcart* [1894] 2 Q. B. 559 ; *Sweet v. Sweet* [1895] 1 Q. B. 12 ; *Barnett v. Howard* [1900] 2 Q. B. 784 ; *Brown v. Dimbleby* [1904] 1 K. B. 28. (For the law under the Act of 1882, see *In re Fieldwick* [1909] 1 Ch. 1.)

(d) *Scott v. Morley* (1887) 20 Q. B. D. 120.

(e) Bankruptcy and Deeds of Arrangement Act, 1913,

The rule that a married woman's contract is presumed to bind her separate property has no application where she contracts as agent (*a*). If she contracts merely as agent for her husband, he alone will be liable; even though the existence of the agency, and the fact that she is a married woman, is unknown to the other contracting party (*b*).

(7) *Lunatics*.—A lunatic's contract is binding upon him; unless it can be shown that the other contracting party was aware, at the time of the making of the contract, that he was so insane as not to be capable of understanding what he was about (*c*). And, in any case, a lunatic is liable to pay a reasonable price for 'necessaries' sold and delivered to him (*d*). In general, a lunatic's contract is not void, but only voidable; it may, therefore, be affirmed by him when he recovers his sanity, and so become binding upon him (*e*).

(8) *Drunken persons*.—The rule as to these is practically the same as that applicable to lunatics (*f*). But it is obvious that it would in most cases be less easy for the party seeking to enforce the contract to be ignorant of the intoxication than of the insanity of the other party.

(9) *Corporations*.—A corporation has, by the common law, generally speaking, the same capacity to contract that a natural person has (*g*). But statutory or

s. 12. (See *post*, ch. vi. p. 261, and bk. iii. ch. ii. p. 431.)

(*a*) Married Women's Property Act, 1893, s. 1.

(*b*) *Paquin v. Beauchlerk* [1906] A. C. 148.

(*c*) *Imperial Loan Co. v. Stone* [1892] 1 Q. B. 599.

(*d*) *Re Rhodes* (1880) 44 Ch. D. 94; *Sale of Goods*

Act, 1893, s. 2.

(*e*) *Matthews v. Baxter* (1873) L. R. 8 Ex. 132.

(*f*) *Gore v. Gibson* (1838) 13 M. & W. 623; *Matthews v. Baxter*, *ubi sup.*

(*g*) *Case of Sutton's Hospital* (1613) 10 Co. Rep. 23; *Wenlock v. River Dee Co.* (1883) 36 Ch. D. at p. 685.

chartered corporations are subject to any restriction imposed by the statute or charter creating them. And joint stock companies, and other companies and corporations created by or under statute for particular purposes, are strictly limited to the powers, of contracting and otherwise, conferred by their memorandum of association, or by the special statute creating them (a). This principle is not confined to corporations, but extends with equal force to every case where a society or association formed for purposes recognised and defined by an Act of Parliament places itself under the Act, and by so doing obtains some statutory immunity or privilege (b). Trade unions, at any rate, if registered under the Trade Union Acts, 1871 and 1876, have been held to fall within this principle (c); but its application to them has been largely removed by the Trade Union Act, 1913. And corporations generally are subject to the rule which, in most cases, requires their contracts to be under seal (d).

Sub-section (7).—*Legality of subject-matter.*

A contract which contemplates an illegal object is, of course, unenforceable; but the mere fact that a contract legal in itself might be performed in an illegal manner, does not necessarily avoid it, unless an intention so to perform it can be proved (e). A bond or other security given for a debt originating in an illegal transaction, is deemed by law to be tainted with the original illegality, and is, there-

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| <p>(a) <i>Ashbury Carriage Co. v. Riche</i> (1875) L. R. 7 H. L. 653; <i>Newcastle-on-Tyne v. A.-G.</i> [1892] A. C. 568; <i>London County Council v. A.-G.</i> [1902] A. C. 165.</p> | <p>in <i>Amalgamated Society of Railway Servants v. Osborne</i> [1910] A. C. at p. 94.</p>                                   |
| <p>(b) <i>Per</i> Lord Macnaghten</p>   | <p>(c) In the case last cited.<br/>(d) See <i>ante</i>, p. 100.<br/>(e) <i>Waugh v. Morris</i> (1873) L. R. 8 Q. B. 202.</p> |

fore, unenforceable (*a*). But where the contract is merely void, and not illegal in the sense of being prohibited, a security given in respect of it, if under seal, is enforceable (*b*). Again, money paid under an illegal agreement, which has been executed wholly or in a material part, cannot be recovered; for the rule is: *in pari delicto, melior est conditio possidentis*. But if the agreement has not yet been carried out in any material respect, the money may be recovered back (*c*). Money paid to a stakeholder to abide the event of a wager can also be recovered in any case, if notice reclaiming it is given before it has been actually paid over to the winner (*d*).

If a party who has paid money under an illegal contract has done so innocently, or in such circumstances that he cannot be regarded as *in pari delicto*, he can recover it, even after performance of the contract (*e*).

Where the promises given for a lawful consideration or contained in a deed are illegal in part only, the legal part of such promises, if separable from the illegal, will be valid (*f*). It is said, however, that

(*a*) *Fisher v. Bridges* (1854) 3 E. & B. 642. Negotiable instruments stand on a special footing. (See *post*, s. ix., pp. 224–225.)

(*b*) *Payne v. Mayor of Brecon* (1858) 3 H. & N. 579.

(*c*) *Taylor v. Bowers* (1876) 1 Q. B. D. 291; *Kearley v. Thomson* (1890) 24 Q. B. D. 746; *Hermann v. Charlesworth* [1905] 2 K. B. 123.

(*d*) *Hampden v. Walsh* (1876) 1 Q. B. D. 189; *Universal Stock Exchange v. Strachan* [1896] A. C. 166.

(*e*) *Reynall v. Sprye* (1852) 1 D. M. & G. 660; *Atkinson v.*

*Denby* (1861) 6 H. & N. 934, 7 H. & N. 934; *Hermann v. Charlesworth* [1905] 2 K. B. 123.

(*f*) *Pigot's Case* (1614) 11 Co. Rep. 27; *Pickering v. Ilfracombe Railway* (1868) L. R. 3 C. P. 250. (The principle appears to have been applied to a contract not under seal in *Cole v. Booker* (1913) 29 T. L. R. 295; but the extent of this rule is uncertain. If A. promises (1) to serve as B.'s clerk for three years, and (2) not to carry on any business similar to that of B. within 300 miles

if any part of the consideration for a promise is illegal, the promise will be void (*a*). Finally, it should be remembered that a contract originally legal may become discharged, owing to illegality subsequently supervening (*b*).

Contracts may be illegal either (1) at common law or (2) by statute. Illegality in the former case is usually based on grounds of immorality, criminality, or antagonism to public policy. In statutory cases, regard is to be had merely to the express provisions of the statute; though, of course, the *ratio legis* would generally be based on similar grounds to those just mentioned. A statute may prohibit a contract, either expressly or by clear implication. The fact of a statute imposing a penalty presumptively implies a prohibition (*c*).

On the other hand, it may be observed that, if a contract is expressly confirmed by Act of Parliament, every clause in it has statutory validity (*d*).

We will consider, briefly, the chief classes of illegal contracts. For the purposes of the present work, only a few kinds require any detailed explanation.

of London for ten years after leaving B.'s service, and B. promises to pay A. 2*l.* a week for his services, A.'s two promises form the consideration for B.'s promise. But, though A.'s second promise is void as being in restraint of trade, no one can doubt that B.'s promise to pay is binding, as well as A.'s promise to serve. Probably the rule applies only where the 'illegal' part of the consideration is the doing, or the promise to do, an illegal or immoral act,

and does not apply where it consists of a promise which is void as being contrary to public policy, but the performance or observance of which is neither illegal nor immoral.)

(*a*) *Fetherstone v. Hutchinson* (1590) Cro. Eliz. 199.

(*b*) *O'Neil v. Armstrong* [1895] 2 Q. B. 418.

(*c*) *Cope v. Rowlands* (1836) 2 M. & W. 149.

(*d*) *Manchester Ship Canal Co. v. Manchester Racecourse Co.* [1901] 2 Ch. 37.

## I. CONTRACTS ILLEGAL BY COMMON LAW.

(1) *Contracts tending to interfere with the government of the State.*—Thus, agreements involving bribery or undue influence at elections (a), agreements for the sale of public offices, agreements for the procuring of titles of honour for a consideration (b), agreements for the sale of public officials' salaries, or pensions for continuing or future public services (c), are all illegal.

(2) *Contracts tending to impede the administration of justice.*—Thus, agreements to pay a witness in proportion to the amount recovered at the trial, or to indemnify a person who goes bail for a prisoner, are illegal (d).

(3) *Contracts for the encouragement or procuring of crimes.*—Thus, an agreement to commit a murder, or to share the proceeds of a crime, or an agreement between several persons to buy shares in a company in order to induce the public to believe that there is a *bonâ fide* market in such shares, is illegal (e).

(4) *Contracts to compound criminal prosecutions.*—Thus, an agreement to acknowledge the signature on a forged bill in consideration of the holder forbearing to prosecute the forger is illegal (f). But the mere existence of a threat of criminal proceedings does not vitiate a contract, if there is no agreement to abstain

(a) *Coppock v. Bower* (1838) 4 M. & W. 361; *Cooper v. Slade* (1857) 6 H. L. C. 746.

(b) *Egerton v. Brownlow* (1853) 4 H. L. C. 1.

(c) *Lucas v. Harris* (1887) 18 Q. B. D. 127.

(d) *Collins v. Blantern* (1767) 2 Wils. 341; *Consolidated, &c. Co. v. Musgrave*

[1900] 1 Ch. 37.

(e) *Everet v. Williams* (1787) Lindley, *Partnership* (8th edn.) 113, n.; L. Q. R. ix. 197; *Scott v. Brown* [1892] 2 Q. B. 724.

(f) *Collins v. Blantern, ubi sup.*; *Brook v. Hook* (1871) L. R. 6 Ex. 89.



from prosecuting (a). And the compromise of a claim for damages is valid; even though the injured party may have an alternative remedy of a public nature by prosecution (b).

(5) *Contracts in the nature of maintenance or champerty*.—An indemnity against costs given to a party for the purpose of maintaining a suit in which the person indemnifying has no *bonâ fide* interest, or an agreement for the sale of the right to any damages recovered in a pending suit, is an illegal contract (c). Contracts which would otherwise amount to maintenance may be justified on the ground of nearness of relationship, or of charity; but charity, though it may be indiscreet, must not be mercenary, and so an agreement to render aid in return for a share in the proceeds of litigation cannot be supported on the ground of charitable motive (d).

(6) *Contracts with an enemy government* or its subjects in time of war are illegal (e). But there is an exception where the Crown grants a licence to trade with the enemy.

(7) *Contracts in restraint of marriage* are, generally speaking, illegal. But the restraint, to be illegal, must be *general*, and not merely restricting marriage with a particular individual or class (f).

(a) *Jones v. Merioneth Building Society* [1892] 1 Ch. 173.

(b) *Windhill v. Vint* (1890) 45 Ch. D. 351.

(c) See, generally, *Bradlaugh v. Newdegate* (1883) 11 Q. B. D. 11; *Alabaster v. Harness* [1895] 1 Q. B. 339; *Rees v. De Bernardy* [1896] 2 Ch. 437; *Fitzroy v. Cave*

[1905] 2 K. B. 364; *Oram v. Hutt* [1913] 1 Ch. 259.

(d) *Harris v. Brisco* (1886) 17 Q. B. D. 504; *Cole v. Booker* (1913) 29 T. L. R. 295.

(e) *Willison v. Patteson* (1817) 7 Taunt. 439; *Janson v. Driefontein Mines* [1902] A. C. 484.

(f) *Scott v. Tyler* (1787) 2 Bro. C. C. 431.

(8) *Marriage-brochage contracts*, or *contracts for procuring marriages for reward*.—Thus, a promise to pay money to a man in consideration of his consent to his daughter's marriage cannot be enforced (a). An agreement, for reward, to introduce a person to others of the opposite sex, with a view to marriage, is a marriage-brochage contract (b).

(9) *Contracts for immoral consideration*, e.g., in consideration of future illicit cohabitation, are illegal. If in consideration of past cohabitation, they are not illegal; but (unless under seal) merely void for want of consideration (c). Even contracts not in themselves immoral, but entered into for the furtherance of immoral purposes, have been held void (d). And the Criminal Law Amendment Act, 1912 (e), authorises the landlord, upon the conviction of the tenant, lessee, or occupier of premises, for knowingly permitting them to be used as a brothel, to determine the lease or other contract under which they are held by the convicted person; unless such lease or contract has been assigned by the latter within three months after the landlord has required him to do so, under the Act. Failure to exercise his rights under this section, after notice of the conviction, may render the landlord criminally liable for aiding and abetting a similar offence subsequently committed upon the premises.

(10) *Contracts for future separation of husband and wife* are illegal. It is immaterial whether they are made before or after marriage. But an agreement to terminate differences by an *immediate* separation is

(a) *Hall v. Potter* (1695) 3 Lev. 411. 94; *Ayerst v. Jenkins* (1873) L. R. 16 Eq. 275; *Phillips*

(b) *Hermann v. Charlesworth* [1905] 2 K. B. 123. *v. Probyn* [1899] 1 Ch. 811.

(c) *Hall v. Palmer* (1844) 13 L. J. Ch. 352; *Benyon v. Wright* [1911] 1 K. B. 506.

(d) *Pearce v. Brooks* (1866) L. R. 1 Ex. 213; *Upfill v. Wright* [1911] 1 K. B. 506.

(e) S. 5.

valid (a). Similarly if a man promises to marry a woman, as soon as his wife shall die, the promise is void (b). But if a woman enters into a contract to marry a man, who is in fact married, but not to her knowledge, she will have a right of action (c).

(11) *Contracts by parents to give up the custody of their children* are illegal (d). But an agreement contained in a separation deed between the father and the mother, to give the custody to the latter, may be good under the Custody of Infants Act, 1873 (e). An agreement by a father depriving him of the control of the religious education of his child is also void (f).

(12) *Contracts in restraint of trade*.—These are illegal on grounds of public policy. The rules upon the subject were, until recent years, in some respects not altogether free from doubt; but they have now been clearly defined by the House of Lords in the case of *Nordenfeldt v. Maxim Nordenfeldt Co.* (g). By this and subsequent cases it is established, that a covenant or other contract in restraint of trade is legal and enforceable, provided that it complies with three conditions; viz. (i.) that the restraint is no wider than is reasonably necessary for the protection of the person in whose favour it is imposed, (ii.) that it is not injurious to the public interests on any specific ground (h), and (iii.) that there is valuable consideration for the contract (i).

(a) *Wilson v. Wilson* (1847)  
1 H. L. C. 538; *Hunt v. Hunt*  
[1897] 2 Q. B. 547.

(b) *Wilson v. Carnley* [1908]  
1 K. B. 729.

(c) *Millward v. Littlewood*  
(1850) 5 Ex. 775.

(d) *Humphrys v. Polak*  
[1901] 2 K. B. 385.

(e) S. 2.

(f) *Agar Ellis v. Lascelles*  
(1879) 10 Ch. D. 49.

(g) [1894] A. C. 535.

(h) See also *Underwood v. Barker* [1899] 1 Ch. 300;  
*Haynes v. Doman* [1899] 2  
Ch. 13.

(i) *Hitchcock v. Coker* (1837)  
6 A. & E. 438; *Gravelly v. Barnard* (1874) L. R. 18 Eq.  
518. (The Court will not  
enquire as to the adequacy of  
the consideration.)

Subject to these three conditions, a restraint on trade is not now regarded as illegal, even though it may be unlimited in point of space, or extend to the whole life of the covenantor. Each case must accordingly be decided upon its merits; and the Court will have regard to all the circumstances in considering whether a case fulfils the conditions above mentioned (a). A restraint may be partly good and partly bad; and in such a case, if, upon a reasonable construction of the contract, the restriction is divisible, the Court will enforce it so far as it is free from objections (b).

The burden of proving that a restraint in any given case is unreasonable lies upon the party who asserts such a contention (c); and the question is one to be decided by the Judge, and not by the jury (d). The law does not *imply* any restraint against carrying on a competing trade in the case of a sale of the goodwill of a business; but the Court will restrain the vendor in such a case from soliciting former customers of the firm (e).

Combinations of workmen for the purpose of restricting the free employment of labour or the free conduct of trade are illegal at common law, as operating in restraint of trade. Similarly, combinations of traders or employers for purposes operating in restraint of trade are illegal (f). Such combinations frequently gave rise to criminal or civil liability (g). And, though trade unions, whether of employers or

(a) A new example of contracts void as being in restraint of trade is introduced by the Patents and Designs Act, 1907, s. 38.

(b) *Dubowski v. Goldstein* [1896] 1 Q. B. 478; *Haynes v. Doman* [1899] 2 Ch. 13.

(c) *Haynes v. Doman*, *ubi sup.*

(d) *Dowden & Pook, Ltd. v.*

*Pook* [1904] 1 K. B. 45.

(e) *Trego v. Hunt* [1896] A. C. 7; *Jennings v. Jennings* [1898] 1 Ch. 378.

(f) *Hilton v. Eckersley* (1856) 6 E. & B. 47.

(g) Civil liability: *Quinn v. Leatham* [1901] A. C. 495; *Giblan v. National Amalgamated Union* [1903] 2 K. B. 600; *Allen v. Flood* [1898]

workmen, have been legalised by the Trade Union Acts, 1871 and 1876, and large exemptions from civil and criminal liability have been given by those Acts, and by the Conspiracy and Protection of Property Act, 1875, and the Trade Disputes Act, 1906, contracts entered into by them or their members in restraint of trade are still incapable of being directly enforced (a).

II. CONTRACTS ILLEGAL OR VOID BY STATUTE. The chief instances of these are as follows.

(1) *Gaming and wagering contracts*.—A not very satisfactory definition of a 'wager' was given by the Court in a well-known case (b), as "a contract by A. "to pay money to B. on the happening of a given event, "in consideration of B. paying money to him on the "event not happening." This definition would need some modification to cover the case of ready money betting; but at any rate it seems clear that, to constitute a wager, there must be a possibility both of gain and loss to each party, depending upon an uncertain event (c). The loss may consist merely in the loss of interest on money left in the hands of the other party (d).

At common law, wagers and bets were not unlawful, and could be enforced by action; except when they were of an indecent nature, or calculated to disturb

A. C. 1; Criminal liability: *E. v. Rowlands* (1851) 17 Q. B. 671; *E. v. Bunn* (1872) 12 Cox, 316; *Curran v. Treleaven* [1891] 2 Q. B. 545.

(a) Trade Union Act, 1871, s. 4; *Russell v. Amalgamated Society of Carpenters and Joiners* [1912] A. C. 421. As to indirect enforcement, see *Yorkshire Miners' Association v. Howden* [1905] A. C. 256; *Osborne v. Amalgamated Society of Railway Servants* [1911] 1 Ch. 540. A trade union is not necessarily illegal at common law. (See the case last cited, and Trade Union Act, 1876, s. 16.)

(b) *Hampden v. Walsh* (1876) 1 Q. B. D. 192.

(c) *Thacker v. Hardy* (1878) L. R. 4 Q. B. D. 685; *Forget v. Ostigny* [1895] A. C. 318; *Lockwood v. Cooper* [1903] 2 K. B. 428; *Richards v. Starck* [1911] 1 K. B. 296.

(d) *Richards v. Starck, ubi sup.*

the peace, or contrary to public policy. They are now governed by certain statutes.

By the Gaming Act, 1710, as amended by the Gaming Act, 1835, all bills and other securities given for money lost in playing at games or pastimes, or betting on the players, or knowingly advanced for such purposes, are deemed to be given for an illegal consideration. Betting on horse races is a typical instance of wagers of this kind (*a*). In certain cases, money paid by the loser upon such securities can be recovered (*b*).

By the Gaming Act, 1845, it is enacted that "all contracts or agreements . . . by way of gaming or wagering, shall be null and void; and no suit shall be brought . . . for recovering any sum of money or valuable thing alleged to have been won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. Provided always, that this enactment shall not be deemed to apply to any subscription or contribution . . . for or towards any plate, prize, or sum of money to be awarded to the winner . . . of any lawful game, sport, pastime, or exercise."

The Act extends to bets and wagers of every kind; and is not confined to betting on games and pastimes, but includes speculations in 'differences,' and time bargains in stock and shares. And the Court will look at the real and not merely the ostensible intention of the parties to any contract; in order to ascertain whether or not it is within the scope of the Act (*c*).

Considerable scope for evading the provisions of this Act has been given by decisions in which it has been held that the winner may recover the amount of a bet,

(*a*) *Woolf v. Hamilton* [1898] 2 Q. B. 337; *Moulis v. Owen* [1907] 1 K. B. 476, (As to the effect of this rule, see *post*, s. ix., pp. 224-225.)

*Nicholls v. Evans* (1913) 30 T. L. R. 42.

(*c*) *Diggles v. Higgs* (1877) 2 Ex. D. 422; *Re Gieve* [1899] 1 Q. B. 794.

(*b*) Act of 1835, s. 2;

if he obtains from the loser a fresh promise to pay it in consideration of the winner forbearing to expose him as a defaulter (a). But, by the Gaming Act of 1892, any promise to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto, is null and void; and no action may be maintained to recover any such sum of money (b). It seems that money *lent* for the purpose of paying bets (and probably money lent for the purpose of making bets) is not 'money paid' within the meaning of this provision (c).

It must be observed that the Act of 1845 only makes bets void, not illegal in the strict sense. Consequently if a commission agent is employed to make a bet for another person, he can be forced by action to pay over to the latter the amount of any winnings (d). The Act of 1892, however, now prevents a commission agent, in the converse case, from suing his principal for money paid in satisfaction of a lost bet. Again, money deposited with a stakeholder to abide the result of a bet, may be recovered on notice given at any time before payment over to the winner (e). A somewhat similar rule applies in the case of lotteries (f).

(a) *Hyams v. Stuart King* [1908] 2 K. B. 696; *Wilson v. Conolly* (1911) 27 T. L. R. 212; *Whiteman v. Newey* (1912) 28 T. L. R. 240; *Hyams v. Coombes* (1912) 28 T. L. R. 413.

(b) *Tatam v. Reeve* [1893] 1 Q. B. 44; *Carney v. Plimmer* [1897] 1 Q. B. 634; *Saffery v. Mayer* [1901] 1 K. B. 11.

(c) *Re O'Shea* [1911] 2 K. B. 981.

(d) *De Mattos v. Benjamin* (1894) 63 L. J. Q. B. 248. It is otherwise in the case of a lottery (*Gorenstein v. Feldmann* (1911) 27 T. L. R. 457).

(e) *O'Sullivan v. Thomas* [1895] 1 Q. B. 698; *Universal Stock Exchange v. Strachan* [1896] A. C. 166; *Shoolbred v. Roberts* [1900] 2 Q. B. 497.

(f) *Barclay v. Pearson* [1893] 2 Ch. 154.

(2) *Simoniacal contracts*.—By the statute 31 Eliz. (1588) c. 6, contracts to present a parson to a vacant 'benefice with cure of souls' for valuable consideration, are void, as savouring of the ecclesiastical offence of simony (a).

(3) *Contracts by certain professional practitioners*.—By the Solicitors Act, 1843, costs for work done as an attorney or solicitor cannot be recovered, unless the plaintiff was the holder of a regular certificate current when the work was done (b). The Medical Act, 1858, similarly prevents any action being brought in respect of fees for medical or surgical advice or services, unless the plaintiff is duly registered as a qualified practitioner (c). Under the Apothecaries Act, 1815, the Pharmacy Act, 1868, the Dentists Act, 1878, and the Veterinary Surgeons Act, 1881, there are similar restrictions with regard to apothecaries, chemists, dentists, and veterinary surgeons respectively.

(4) *Contracts within the 'Tippling Acts'*.—By the Sale of Spirits Act, 1750 (d), and the County Courts Act, 1888 (e), provisions are made restraining actions in respect of certain debts and contracts on account of liquor consumed on the premises of the seller, or supplied in less than a given quantity at one time.

(5) *Contracts within the Truck Acts, 1831, 1887, and 1896*.—The effect of these Acts, shortly stated, is to render void contracts for the payment of wages otherwise than in money, and contracts by servants to spend wages at particular shops.

(a) *Fox v. Bishop of Chester* (1829) 6 Bing. 1. (c) 21 & 22 Vict. c. 90, s. 32; *post*, bk. iv. ch. xviii. (vol. iii., pp. 275–276).  
(See also the Benefices Act, 1898.)

(b) 6 & 7 Vict. c. 73, s. 26; (d) 24 Geo. 2, c. 40, s. 12.  
(e) 51 & 52 Vict. c. 43, s. 182.  
*post*, bk. iv. ch. xviii. (vol. iii., pp. 284–285).



(6) *Contracts within the Weights and Measures Acts, 1878 to 1904, and the Coinage Act, 1870.*—These provide in effect, that all contracts by weight or measure, or relating to money, shall (with certain exceptions such as contracts referring to weights or measures of the metric system, and ‘cran’ measures (a)) be made in accordance with the imperial statutory weights or measures, or the current coin of the realm, respectively.

(7) *Insurance contracts in certain cases.*—By the Marine Insurance Act, 1906, so far as regards marine insurance, and by the Life Assurance Act, 1774, so far as regards life, fire, and other insurances, policies are void except in so far as the person insured had an ‘interest’ in the subject-matter of the policy. An interest, in this sense, must, generally speaking, be a pecuniary interest (b); but every person is deemed to have an insurable interest in his own life, and husband and wife in each other’s life (c). Parent and child have not, as such, any insurable interest in each other’s life (d).

#### Sub-section (8).—*Reality of Consensus.*

The reality of the *consensus* of the parties to an agreement may be vitiated by the following circumstances, *i.e.*, (A) mistake; (B) misrepresentation, either innocent or amounting to fraud; (c) duress; and (d) undue influence (e). It will be necessary to con-

(a) See *post*, bk. iv., pt. i., ch. vi. (p. 628).

(b) *Halford v. Kymer* (1830) 10 B. & C. 728.

(c) *Wainwright v. Bland* (1835) Moo. & R. 481, 1 M. & W. 32; *Reed v. Royal Exchange Insurance Co.* (1809) Peake, Add. Ca. 70; *Griffiths v. Fleming* [1909] 1 K. B. 805.

(d) *Barnes v. London, &c.*

*Assurance Co.* [1892] 1 Q. B. 864; *Harse v. Pearl Life Assurance Co.* [1904] 1 K. B. 558.

(e) The phrase ‘reality of *consensus*’ has been retained in deference to tradition; but its application to the cases dealt with in this sub-section is not free from objection. Mistake, where it is

sider somewhat in detail the nature of each of these circumstances, and its precise legal effect upon an agreement.

(A) *Mistake*.—The principles upon which mistake is held to vitiate a contract, are somewhat difficult in their application. It is necessary in the first place to observe, that mistake must be distinguished from mere forgetfulness, which is not a ground for relief (a). In the next place, mistake affecting the agreement itself must be distinguished from mistake in the expression of the terms of the agreement. In the latter case, the contract is not void, though in equity it may be liable to be rectified or cancelled; but such relief, generally speaking, is not given unless the mistake was mutual, or, if unilateral, was induced, or knowingly taken advantage of, by the other party (b). Cases of this kind usually arise where an agreement has been reduced to writing, and the writing, by clerical error or otherwise, does not properly express the common intention of the parties. True mistake must also be distinguished from cases of fraud or misrepresentation by the other party to the contract. Such cases come under the heads dealt with later on.

Further, a careful distinction must be drawn between mistakes of fact and of law. Mistake of law

legally operative, usually excludes any real consent at all. On the other hand, a consent obtained by fraud, misrepresentation, or duress, is usually a perfectly real consent; but the law rightly holds that there are vitiating circumstances, which entitle the party who is affected by them to repudiate the contract.

(a) *Barrow v. Isaacs* [1891] 1 Q. B. 417; *Eastern Telegraph Co. v. Dent* [1899] 1 Q. B. 835.

(b) *Webster v. Cecil* (1861) 30 Beav. 62; *Garrard v. Frankel* (1862) 30 Beav. 445; *Stewart v. Kennedy* (1890) L. R. 15 App. Ca. 108; *Wilding v. Sanderson* [1897] 2 Ch. 534.

is usually not a ground upon which a party can be relieved from a contract. *Ignorantia juris haud excusat* (a). So, money paid under mistake of law, or by compulsion of legal proceedings, cannot, as a rule, be recovered (b). There are, however, a few exceptions in which relief is given, even on this ground, e.g., mistake as to matters of private *right* or *title* (c); mistake as to foreign law, which is regarded as a mistake of fact (d); mistake of law caused by the other party to the contract, though the limits of this exception are somewhat doubtful (e); and the case of money paid by mistake of law to an officer of the court, such as a receiver, trustee in bankruptcy, or official liquidator (f).

Coming then to mistakes of fact with reference to the agreement itself, as distinguished from the cases hitherto mentioned, the rule is: that a contract induced by such mistake in the following classes of cases is *void* :—

(1) *Where the mistake is as to the very nature of the contract itself.* If A. signs a promissory note thinking that he is merely attesting a deed or other document, the note is totally void (g). It has generally been supposed that the contract would not be void if the belief of the mistaken party was attributable to

(a) *Stewart v. Kennedy*, *ubi sup.*; *Wilding v. Sanderson*, *ubi sup.*

(b) *Moore v. Fulham Vestry* [1895] 1 Q. B. 399; *Ward v. Wallis* [1900] 1 Q. B. 675.

(c) *Cooper v. Phibbs* (1867) L. R. 2 H. L. 170; *Daniel v. Sinclair* (1881) L. R. 6 App. Ca. 181.

(d) *Leslie v. Baillie* (1837) 2 Y. & C. 91.

(e) *Stewart v. Kennedy*, *ubi sup.*; *Harse v. Pearl Life*

*Assurance Co.* [1904] 1 K. B. 558.

(f) *Re Opera* [1891] 3 Ch. 260; *Ex parte Rhoades* [1899] 2 Q. B. 347.

(g) *Thoroughgood's Case* (1584) 2 Co. Rep. 9; *Foster v. Mackinnon* (1869) L. R. 4 C. P. 704; *Lewis v. Clay* (1898) 67 L. J. Q. B. 224; *Howatson v. Webb* [1907] 1 Ch. 537; *Bagot v. Chapman* [1907] 2 Ch. 222.

his own negligence ; and such cases have rarely arisen, except where the mistake was induced by the fraud of the other contractor, or of a third party. But in a recent case the Court of Appeal has held, that negligence (except perhaps where the document signed was a negotiable instrument) is immaterial, and does not 'estop' the person who signs, from pleading *non est factum* (a).

(2) *Where the mistake is as to the identity of the person contracted with, e.g., where A. agrees to sell goods to B., believing him to be C. (b).* Here the contract is wholly void ; because there was no intention at all, on the part of one of the contractors, to deal with the other.

(3) *Where there is a common mistake as to the identity of the subject-matter of the contract, e.g., where there is a contract for sale of a cargo 'to arrive ex 'Peerless from Bombay,' and, there being two ships answering that description, the buyer means one and the seller the other (c).*

(4) *Where there is a common mistake as to the existence of the subject-matter of the contract, e.g., where A. contracts to sell to B. a cargo of corn, which, in fact, has, at the date of the sale, ceased to exist (d).* So, sales of life-annuities and policies of life insurance have been held void in cases where, unknown to both parties, the life had ceased (e).

(a) *Carlisle and Cumberland Banking Co. v. Bragg* [1911] 1 K. B. 489.

(b) *Cundy v. Lindsay* (1878) L. R. 3 App. Ca. 459 ; *Baillie's Case* [1898] 1 Ch. 110 ; *Gordon v. Street* [1899] 2 Q. B. 641.

(c) *Raffles v. Wichelhaus*

(1863) 2 H. & C. 906.

(d) *Couturier v. Hastie* (1856) 5 H. L. C. 673 ; Sale of Goods Act, 1893, s. 6.

(e) *Strickland v. Turner* (1852) 7 Ex. 208 ; *Scott v. Coulson* [1903] 2 Ch. 249.

In some cases a contract which, contrary to the belief of both parties, was from the beginning impossible, has been treated as void, and money paid under it has been ordered to be repaid (a).

(5) *Where the mistake is as to the intention of the other party, and is known to such other party.* Thus, if A. agrees to buy from B. certain goods, desiring goods of a particular kind, and believes that B. is promising to sell him goods of that particular kind, and B. knows that A. has such a belief, and that the goods are not, in fact, of the kind in question, the contract will be void (b).

On the other hand, it must be remembered that, except in the above cases, a unilateral mistake on the part of one contractor, whether it arises from negligence or ignorance or otherwise, does not entitle him to avoid the contract. So, if A. bids at an auction for a specified lot, thinking that it comprises property different from what it in fact comprises, he is bound (c); or if A. buys an old edition of Shakspeare from B., believing, in reliance on his own knowledge and without any representation from B., that it is a first folio, he cannot get off his bargain, even though B. was perfectly aware that the book was not a first folio. But it is said that, even in unilateral mistake, a court of equity has, in some cases, refused to enforce the contract by a decree for specific performance, though the mistake would have been no answer to

(a) *Clifford v. Watts* [1870] L. R. 5 C. P. 577; *The Salvador* (1909) 25 T. L. R. 384; *ibid.*, 727; 26 T. L. R. 149. (But see *Hills v. Sughrue* (1846) 15 M. & W. 253.)

(b) *Smith v. Hughes* (1871) L. R. 6 Q. B. 597.

(c) *Tamplin v. James* (1880) 15 Ch. D. 215; *Turner v. Green* [1895] 2 Ch. 205. (But see *Van Praagh v. Everidge* [1902] 2 Ch. 266; but see [1903] 1 Ch. 434, per Collins, M.R.)

a claim at common law (a). It would seem, however, that these cases (so far as rightly decided) were cases of mistake known to and taken advantage of by the other party, and therefore falling under the fifth rule, stated above (b).

(B) *Misrepresentation and fraud*.—Putting aside the cases in which a misrepresentation causes a mistake of such a kind as to render the contract *void*, a misrepresentation made by one party and inducing the other to enter into a contract, will render the contract *voidable* at the option of the party who has been misled (c).

Misrepresentation may be either innocent or fraudulent. Innocent misrepresentation by one party entitles the other party to rescind a contract, and, as incident to such rescission, to recover only what he has spent or parted with in pursuance of the contract, so as to restore him as far as possible to his *status quo* (d). But an executed contract for the sale of a chattel or *chose in action*, i.e., a contract which has been carried out by actual conveyance or transfer, will not be rescinded on the ground of innocent misrepresentation (e). In a few exceptional cases, apart from any right to rescission, damages may be obtained even in the case of innocent misrepresentation; for instance, upon a warranty of authority, where a person honestly represents himself as being the authorised agent of another person, having, in fact, no such authority (f);

(a) *Malins v. Freeman* (1838) 2 Keen, 25; *Harris v. Pepperell* (1867) L. R. 5 Eq. 1.

(b) *Jones v. Rimmer* (1880) 14 Ch. D. at p. 592; *May v. Platt* [1900] 1 Ch. 616.

(c) E.g., *Cundy v. Lindsay* (1878) L. R. 3 App. Ca. 459; *Lewis v. Clay* (1898) 67 L. J. Q. B. 224.

(d) *Redgrave v. Hurd* (1881)

20 Ch. D. 1; *Adam v. Newbigging* (1888) L. R. 13 App. Ca. 308.

(e) *Seddon v. North Eastern Salt Co.* [1905] 1 Ch. 326.

(f) *Firbank v. Humphreys* (1886) 18 Q. B. D. 54; *Starkey v. Bank of England* [1903] A. C. 114; *Yonge v. Toynbee* [1910] 1 K. B. 215.

and where directors honestly, but on unreasonable grounds, make untrue statements in a company prospectus (*a*). Generally speaking, however, innocent misrepresentation cannot be made the ground of a claim for damages.

But where a misrepresentation amounts to *fraud*, in addition to a right to rescission, which may exist even when the contract has been executed, the defrauded party has an action of deceit, by which he can recover full damages for loss of bargain or other damage sustained (*b*).

It is clear that a claim for deceit cannot be made against an assignee of the fraudulent party's rights under the contract; and if the defrauded party has parted with his interest under the contract, so that matters can no longer be restored to their original position, he cannot set up the fraud of the original party as a defence to the action by the assignee (*c*).

The essential elements, common to both innocent and fraudulent misrepresentation, are as follows. (1) There must be an untrue representation of *fact* (*d*). But "the state of a man's mind is just as much a fact "as the state of his digestion"; and a person who states that he has a certain opinion or intention, which he has not, is guilty of a misrepresentation of fact (*e*). Such a statement must, however, be care-

(*a*) Directors' Liability Act, 1890, s. 3; Companies Act, 1900, s. 9, both now repealed and re-enacted by Companies (Consolidation) Act, 1908, s. 83.

(*b*) *Peek v. Gurney* (1873) L. R. 6 H. L. 377; *Burrows v. Rhodes* [1899] 1 Q. B. 816.

(*c*) *Stoddart v. Union Trust* [1912] 1 K. B. 193.

(*d*) *Beattie v. Ebury* (1872) L. R. 7 H. L. 102; *Ex parte*

*Burrell* (1876) 1 Ch. D. 552.

(*e*) *Edgington v. Fitzmaurice* (1885) 29 Ch. D. at p. 483. Whether a misrepresentation of law has the same effect as a misrepresentation of fact, is doubtful. It seems clear, that a misrepresentation as to the legal effect of a transaction which is induced by such representation, is a ground of setting it aside. (*Stewart v. Kennedy* (1890)

fully distinguished from a mere expression of opinion, which turns out to be unfounded; for that is not a misrepresentation of fact. (2) It must be a definite representation, not mere 'puffing' or general commendation of the subject-matter of the contract (a). (3) It must be in a material particular, and calculated to act as an inducement to the contract (b). (4) The other party must be actually misled by it, and induced to enter into the contract in reliance upon it, and must suffer prejudice in consequence (c).

In cases of *fraud*, a further element is necessary, *i.e.*, the false representation must be made " (1) knowingly, or (2) without belief in its truth, or (3) recklessly, "careless whether it be true or false"; in other words, the party making the misstatement must do so without any honest belief in the truth of it. This was finally established by the House of Lords in the great case of *Derry v. Peek* (d), where the old theory of a supposed distinction between 'legal' and 'moral' fraud was exploded, and it was settled, that a misrepresentation honestly believed in is not fraudulent merely because the belief is based on unreasonable grounds (e). Here again, however, such a statement, though it will not be fraudulent, may have important consequences, as an 'innocent misrepresentation.'

L. R. 15 App. Ca. 108; *Wilding v. Sanderson* [1897] 2 Ch. 534.) But it has been held that an *innocent* representation that a proposed contract was valid, gives no right to recover moneys paid in pursuance of such contract, should it turn out to be void. (*Harse v. Pearl Life Assurance Co.* [1904] 1 K. B. 558.)

(a) *Scott v. Hanson* (1826) 1 Sim. 13. (But distinguish *Smith v. Land Corporation* (1884) 28 Ch. D. 7.)

(b) *Smith v. Chadwick* (1884) L. R. 9 App. Ca. 196.

(c) *Arkwright v. Newbold* (1881) 17 Ch. D. 301; *Redgrave v. Hurd* (1881) 20 Ch. D. 1; *Smith v. Chadwick, ubi sup.*; *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899] 2 Ch. 392.

(d) *Derry v. Peek* (1889) L. R. 14 App. Ca. 337.

(e) *Angus v. Clifford* [1891] 2 Ch. 449; *Le Lievre v. Gould* [1893] 1 Q. B. 491.



In one class of cases, *i.e.*, representations as to the "character, conduct, credit, ability, trade, or dealings of any other person, to the intent that such other person may obtain credit," an action does not lie unless the representation was made in writing signed by the party to be charged (*a*). It should also be remembered, that a fraudulent representation need not necessarily be made direct to the party who seeks to recover damages in respect of it; provided such party was intended to act upon it (*b*).

A misrepresentation must be carefully distinguished from a *warranty*. The latter is an agreement contemporaneous with, but collateral to, the main purpose of, a contract, by which, in effect, one party asserts a particular fact, and expressly or implicitly undertakes to be responsible in damages if it should turn out to be untrue. The remedy for a breach of warranty is therefore damages; and this remedy may exist independently of any right to rescission. It is often difficult to determine whether a statement made by a contractor, at or about the time of the contract, is a mere representation, or a warranty. The question must be settled by examining the facts of each particular case (*c*).

*Contracts uberrimæ fidei*.—There are certain classes of contracts to which this name is applied, the common characteristic of which is, that they may be avoided on account of mere non-disclosure of a material fact.

(*a*) Statute of Frauds Amendment Act, 1828 (Lord Tenterden's Act), s. 6; *Clydesdale Bank v. Paton* [1896] A. C. 381; *Hirst v. West Riding Banking Co.* [1901] 2 K. B. 560.

(*b*) *Scott v. Dixon* (1859) 29 L. J. Ex. 62; *Peek v. Gurney* (1873) L. R. 6 H. L. 377; *Andrews v. Mockford* [1896] 1 Q. B. 372; *Tackey v. McBain* [1912] A. C. 186.

(*c*) *Bentsen v. Taylor* [1893] 2 Q. B. 274; *De Lassalle v. Guildford* [1901] 2 K. B. 215; *Wallis v. Pratt* [1910] 2 K. B. at p. 1012; [1911] A. C. 394; *Heilbutt v. Buckleton* [1912] A. C. 30.

In other words, there is a positive duty imposed on one, or, in a few cases, on each party, not only to refrain from active misrepresentation, but also to communicate to the other every fact relevant to the contract which would materially affect the other's judgment. Such cases are exceptions to the general rule, which is, that mere *suppressio veri*, or non-disclosure of facts, does not invalidate a contract—at all events, unless there is such 'industrious concealment,' as, in effect, to amount practically to fraudulent misrepresentation (*a*); and generally speaking, "simple reticence" does not amount to legal fraud, however it may be "viewed by moralists" (*b*). The chief classes of contracts *uberrimæ fidei* are the following: (1) contracts of insurance in respect of life, fire, and maritime or other risks (*c*); (2) contracts to take shares in a company based upon a prospectus issued by the company, at all events if the suppression "contains a suggestion "of falsity," or is in breach of the requirements of the Companies (Consolidation) Act, 1908 (*d*); (3) contracts for compositions with creditors (*e*); and (4) family arrangements (*f*). It is sometimes said, that ordinary contracts of guarantee are also within the rule; but this does not seem in harmony with authority (*g*).

(*a*) *Schneider v. Heath* (1813) 3 Camp. 506; *Gordon v. Street* [1899] 2 Q. B. 641.

(*b*) *Per* Lord CAMPBELL, C., in *Walters v. Morgan* (1861) 3 De G. F. & J. at p. 723.

(*c*) *Ionides v. Pender* (1874) L. R. 9 Q. B. 531; *London Assurance v. Mansel* (1879) 11 Ch. D. 363; *Seaton v. Heath* [1899] 1 Q. B. 782; [1900] A. C. 135; Marine Insurance Act, 1906, s. 18.

(*d*) S. 81; *New Brunswick Railway Co. v. Mugge-*

*ridge* (1860) 1 Dr. & Sm. 381; *McKeown v. Boudard* (1896) 74 L. T. 712; *Aaron's Reefs v. Twiss* [1896] A. C. 273.

(*e*) *Britten v. Hughes* (1828) 5 Bing. 466, *per* BEST, C.J.

(*f*) *Greenwood v. Greenwood* (1863) 2 D. J. & S. 28.

(*g*) *Davies v. London Provincial Insurance Co.* (1878) 8 Ch. D. 469; *Seaton v. Heath, ubi sup.* (But see *London General Omnibus Co. v. Holloway* [1912] 2 K. B. 72.)

Some text-book writers also place contracts for the sale of land in this class ; but this also appears not to be strictly accurate, though suppression of defects in title is a reason for rescinding the contract, on the ground that the vendor fails to perform what he has implicitly contracted to do, namely, to give a good title. " Under such a state of facts, the purchaser may be considered as not having purchased the thing which was "really the subject of the sale " (a). Suppression of other defects may, on the ground of hardship, be a reason for refusing specific performance (b).

(c) *Duress*.—When a party is induced to enter into a contract by actual or threatened personal violence to himself, his wife, or child, he is said to act under duress ; and the contract is voidable at his option (c). Threats or violence in respect of goods or other property are not sufficient to avoid a contract ; but where money is paid to release property wrongfully withheld, it may be recovered back (d). So also, a contract made by an agent of the party suffering the duress, in order to remove the duress from his principal, is voidable (e).

(d) *Undue influence*.—When the parties to a contract or other transaction are in such a relationship or position to each other that, by force of circumstances, "dominion" may be exercised by one person over "another," it is a general principle of law, that there is a presumption of undue influence ; and "the transaction cannot stand, unless the person claiming "the benefit of it is able to repel the presumption by

(a) *Flight v. Booth* (1834) 1 Bing. N. C. 370 ; *Molyneux v. Hawtrey* [1903] 2 K. B. 487.

(b) *Fry, Specific Performance*, §§ 402, 713 ; *Turner v. Green* [1895] 2 Ch. 205 ; *Hope v. Walter* [1900] 1 Ch. 257.

(c) Co. Litt. 253 b ; 2 Inst. 483 ; *Scott v. Sebright* (1886) 12 P. D. 21 ; *Cooper v. Crane* [1891] P. 369.

(d) *Wakefield v. Newbon* (1844) 6 Q. B. 276.

(e) *Cumming v. Ince* (1847) 11 Q. B. 112.

“contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable” (a).

As between persons who are of full legal capacity, of sound mind and competent understanding, and not in any fiduciary or dependent relationship to each other, it is, of course, almost impossible for a case of ‘undue influence’ to arise, unless it, in effect, amounts either to fraud or duress (b). But the presumption above mentioned arises in a number of cases in which one of the parties to a transaction is at some obvious and well-marked disadvantage as compared with the other.

The chief instances are as follows: (1) contracts for the sale of reversionary interests, or other agreements made by ‘expectant heirs’ upon the credit of their expectancy (c); (2) agreements whereby persons obtain a benefit from others to whom they stand in a fiduciary relation, such as agreements between parents and children, trustees and beneficiaries, solicitors and clients, guardians and wards, directors or (in the case of a sale to the company) promoters of a company and the company (d); (3) agreements by persons at a disadvantage owing to their illiteracy or their ignorance of business, and absence of independent advice or extreme necessity (e); (4) agreements by any person in favour

(a) *COTTENHAM*, L.C., in *Dent v. Bennett* (1838) 4 M. & Cr. 277; *SELBORNE*, L.C., in *Aylesford v. Morris* (1873) L. R. 8 Ch. 489.

(b) *Barnes v. Richards* (1902) 86 L. T. 231.

(c) *Chesterfield v. Janssen* (1750) 2 Ves. Sen. 125; *Brenchley v. Higgins* (1901) 83 L. T. 751.

(d) *Fox v. Mackreth* (1788) 2 Bro. C. C. 400; *Re Cape Breton Co.* (1885) 29 Ch. D.

795; *De Witte v. Addison* (1899) 80 L. T. 207; *Powell v. Powell* [1900] 1 Ch. 243; *Barron v. Willis* [1900] 2 Ch. 121; *Re Lady Forrest Murchison Gold Mine* [1901] 1 Ch. 582; *Re Leeds and Hanley Theatres of Varieties Co.* [1902] 2 Ch. 809; *Wright v. Carter* [1903] 1 Ch. 27.

(e) *Fry v. Lane* (1889) 40 Ch. D. 312; *James v. Kerr* (1889) *ibid.* 449; *Rees v. De Bernardy* [1896] 2 Ch. 437.

of another, who, owing to some peculiar relationship, has special facilities for exercising dominion or influence over him, *e.g.*, between medical men and their patients, or persons and their spiritual, religious, and other confidential advisers (*a*). By the Money-lenders Act, 1900, relief may now be given against a transaction which is 'harsh and unconscionable'; even though it is not such that a court of equity would have given relief in respect of it before the Act (*b*). Protection has, however, been extended to dealings by *bond fide* holders in securities given to a money-lender (*c*).

Sub-section (9).—*Discharge of Contracts.*

The chief modes in which a contract may be discharged are the following:—(1) by express agreement or release; (2) by alteration of a written agreement; (3) by performance; (4) by accord and satisfaction; (5) by merger; (6) by bankruptcy; (7) by breach of contract by the other party; (8) to a certain extent, by the statutes of limitation; and (9) by impossibility of performance. We will consider these briefly in the order mentioned.

(1) *Express agreement for rescission.*—If both parties mutually agree to put an end to a contract which has not yet been completely performed on either side, the contract is effectually discharged. If, however, it has been performed by one party, the other can only be discharged if he is properly *released*, either under seal or for some express consideration; because otherwise the

(*a*) *Mitchell v. Homfray* v. *Smith* [1906] 1 K. B. (1881) 8 Q. B. D. 587; *Allcard* 79; *Wilton v. Osborne* [1901] v. *Skinner* (1887) 36 Ch. D. 2 K. B. 110; *King v. Hay* 145; *Morley v. Loughnan* *Currie* (1911) 28 T. L. R. [1893] 1 Ch. 736; *Barnes v.* 10; *Stirling v. Musgrave* *Richards* (1902) 50 W. R. 363. (1913) 29 T. L. R. 333.

(*b*) *Samuel v. Newbold* (*c*) Money-lenders Act, [1906] A. C. 461; *Carringtons* 1911, s. 1.

promise to release would have no consideration to support it (a). Non-performance for a considerable lapse of time may raise an implication of an agreement to abandon the contract (b). Sometimes the original contract contains an express provision that, in certain events, or upon certain conditions, the contract shall cease to be operative. In such a case it *ipso facto* determines upon the happening of the event, or the fulfilment of the condition. Familiar instances of conditions subsequent are to be found in the case of bonds, and in tenancy or other agreements terminable by notice.

Finally, a contract may by agreement be discharged by means of a substituted contract, which expressly or by implication supersedes it. This is sometimes called *novation*, and may arise either by a new agreement between the same parties varying the old terms, or by an agreement by which a new party is substituted for an original one.

A release under seal is applicable, not only where one party desires to discharge the other from performance, but also where he desires to discharge the other from the right of action which has accrued by reason of a breach committed by the other. But, in the absence of a release under seal, such a right of action can be discharged only by *accord and satisfaction*, which is dealt with hereafter.

(2) *Alteration of written agreement.*—An intentional alteration of a contract in writing or under seal, in a material respect, by one party, without the consent of the other, as a general rule prevents the former from enforcing the contract at all against the latter. The alteration must be material (c), and must not be merely

(a) *King v. Gillett* (1840) 7 M. & W. 55.

(b) *Bond v. Walford* (1886) 32 Ch. D. 238.

(c) *Suffell v. Bank of England* (1882) 9 Q. B. D. 555; *Lowe v. Fox* (1887) L. R. 12 App. Ca. 206.

accidental, or by mistake. As regards alterations in bills of exchange and promissory notes, special provisions are made by the Bills of Exchange Act, 1882 (*a*).

(3) *Performance*.—A contract must, of course, be performed strictly in accordance with its terms; but, if so performed, it is obvious that it is discharged as regards the liability of the party who has performed it. Performance must be completed at or within the time specified, or, if none be specified, then within a reasonable time (*b*). As regards place, performance must be at the agreed place, if any; and if none, then the debtor is bound to find the creditor, being in the jurisdiction, and offer him payment or performance (*c*).

Incidentally, the subject of *tender* should be noted. Tender is an attempted payment or performance by the debtor or party liable; and, except in case of tender of money, the tender (if refused) is equivalent to performance, and discharges the liability (*d*). A tender of money does not of itself discharge the debt; but if the debtor is sued and pleads the tender, and that he at all times continued ready and willing to pay, and brings the money into court, he becomes entitled to his costs, if the plaintiff recovers no more than what was tendered (*e*). The tender must comply with all the conditions of actual performance as regards time, place, and manner; and must be unconditional (*f*).

(4) *Accord and satisfaction* is really nothing more than an agreement by one party to accept some offer in satisfaction of his right of action for breach of

(a) S. 64.

(b) *Carlton Co. v. Castle Mail Co.* [1898] A. C. 486.

(c) Co. Litt. 210 b; *Comber v. Leyland* [1898] A. C. 524.

(d) *Startup v. Macdonald*

(1843) 6 M. & G. at p. 610.

(e) *Kinnaird v. Trollope* (1889) 42 Ch. D. 610.

(f) *Finch v. Brook* (1834) 1 Bing. N. C. 253; *Greenwood v. Sutchiffe* [1892] 1 Ch. 1.

contract by the other party, and the performance of that offer (a). In this case it has been held, that, to amount to a discharge, the offer must actually be performed, and not merely promised (b); but the making of a new contract may (if such is the intention of the parties) be treated as an actual satisfaction for this purpose—*e.g.*, the giving of a negotiable instrument, or a composition with creditors, may be a satisfaction of a previously existing contract (c).

(5) *Merger*.—This occurs where a party, by taking or acquiring a security of a higher nature in legal operation than the one he already possesses, merges or extinguishes his legal remedies upon the minor security or cause of action. Thus, a simple contract is merged in a bond or contract by deed; and the remedy upon any contract, whether simple or by specialty, is merged in a judgment obtained in respect of it. In order that merger may take place, the two securities or causes of action must, however, be substantially identical and co-extensive; and the parties must be the same (d).

(6) *Bankruptcy*.—After a receiving order is made against a debtor, no creditor has any remedy against the property or person of the debtor, or may commence (against him) any action or other legal proceeding, unless with the leave of the Court (e). But a secured creditor may realise or otherwise deal with his security. When a bankrupt has obtained an order of discharge, it releases him from all contract debts

(a) *Day v. McLea* (1889) 37 Ch. D. 406.  
22 Q. B. D. 610.

(b) *Hall v. Flockton* (1851) Rep. 45 b; *Holmes v. Bell* (1841) 3 M. & G. 213; *Commissioners of Stamps v. Hope*

(c) *Good v. Cheeseman* (1831) 2 B. & Ad. 328; *Crowther v. Farrar* (1850) 15 Q. B. 677; *Hall v. Flockton, ubi sup.*; *Bidder v. Bridges* (1887)

(d) *Higgen's Case* (1605) 6  
[1891] A. C. 476.  
(e) Bankruptcy Act, 1883,  
s. 9 (1).



provable in bankruptcy(a), except debts on recognisance, debts chargeable at the suit of the Crown or the public revenue, or on bail bonds, unliquidated claims for damages in tort, and debts or liabilities incurred by means of any fraud or fraudulent breach of trust (b). This subject is, however, more fully dealt with elsewhere in this work (c).

(7) *Breach of contract*.—Breach of contract by one party does not necessarily discharge the other. It only does so, and then only at the latter's option, first, where the breach occurs either before or after performance was due, and consists in some act which altogether disables the defaulting party from performing his promise—*e.g.*, where A. promises to marry B. and subsequently marries C. (d); secondly, where one party expressly and unequivocally renounces the contract, and notifies his intention not to perform it (e); thirdly, where the duty of one party to perform his part of a contract is expressly or implicitly conditional on the other performing his, and such other makes default in doing so. Thus, on a sale of goods, payment by the buyer and delivery by the seller are conditional on each other (f). But a partial failure to perform does not entitle the other party to treat the contract as discharged; unless the breach amounts to a repudiation, or virtually deprives him of what he hoped to get by this contract (g). And mere delay in per-

(a) Bankruptcy Act, 1883, ss. 30, 37.

(b) Bankruptcy Act, 1890, s. 10.

(c) See *post*, book ii. pt. ii. ch. vi. (pp. 290–291.)

(d) *Short v. Stone* (1846) 8 Q. B. 358; *O'Neil v. Armstrong* [1895] 2 Q. B. 70, 418.

(e) *Hochster v. De la Tour* (1853) 2 E. & B. 678; *Rhymney Railway v. Brecon, &c.*

*Railway* (1900) 83 L. T. 111; *General Billposting Co. v. Atkinson* [1909] A. C. 118.

(f) Sale of Goods Act, 1893, s. 28.

(g) *Pust v. Dowie* (1863) 32 L. J. Q. B. 179; *Freeth v. Burr* (1874) L. R. 9 C. P. 208; *Honck v. Muller* (1881) 7 Q. B. D. 92; *Mersey Steel Co. v. Naylor* (1884) L. R. 9 App. Ca. 434.

formance beyond the time stipulated is not a ground of discharge, unless “time is of the essence of the contract.” Under the Judicature Act, 1873 (*a*), this equitable rule is extended to all divisions of the High Court; but the rule is not applicable where the parties have expressly agreed that time shall be of the essence of the contract, or such an intention may be inferred from its nature. Thus, it has been held that the equitable rule does not in general apply to commercial contracts (*b*); but the Sale of Goods Act, 1893, provides (*c*) that stipulations as to the *time of payment* are not of the essence of the contract. It need hardly be said that delay in the performance of a contract entitles the other party to damages for any loss which he may have suffered by such delay; but, where the performance delayed consists merely in the payment of a fixed sum of money, damages will usually be restricted to interest on the sum due at the legal rate (*d*). And the creditor has a right, on giving reasonable notice, to fix a day after which time will become ‘of the essence’ (*e*).

(8) *Statutes of Limitation*.—Generally speaking, actions in respect of simple contracts are barred if not commenced within six years after the right of action first accrued (*f*). Similarly, actions in respect of contracts under seal are barred by twenty years’ limitation (*g*); except in the case of actions to recover money charged on land, which are barred at the end of twelve years (*h*). Time may be prevented from running

(*a*) S. 25 (7).

(*b*) *Reuter v. Sala* (1879) 4 C. P. D. 239.

(*c*) S. 10.

(*d*) *Wallis v. Smith* (1882) 21 Ch. D. 243.

(*e*) *Hatten v. Russell* (1888) 38 Ch. D. 334.

(*f*) Limitation Act, 1623, s. 3.

(*g*) Civil Procedure Act, 1833, s. 3.

(*h*) Real Property Limitation Act, 1874, s. 8. (For further details as to limitation of actions, see *post*, bk. v. ch. ix.)

by reason of certain disabilities, such as infancy and insanity ; and also by part payment or written acknowledgment by the debtor. The statutes, it should be noted, so far as they affect contracts, only bar the remedy, and do not, as a general rule, extinguish the right ; and therefore the right may sometimes be enforced indirectly—*e.g.*, by realisation of a lien or mortgage securing the debt, by an executor-creditor exercising his right of retainer, or by the creditor appropriating to a barred debt an unappropriated payment made by the debtor (*a*).

(9) *Impossibility of performance*.—As a general rule, a contract which is not absolutely and physically impossible of performance when it is made, is not discharged merely because it subsequently becomes impossible (*b*). But there are certain exceptions to this rule, of which the following are the most important :—(i.) where a contract becomes impossible of performance by a change of English law (*c*) ; (ii.) where a contract is for personal services, and performance is prevented by the personal incapacity of the party, owing to death, illness, or otherwise (*d*) ; (iii.) where the performance of the contract is dependent on the continued existence of a specific thing or state of things, which is accidentally destroyed or comes to an end (*e*) ; and (iv.) where the impossibility is caused by the act of one of the parties to the contract, the other is, as we have already seen, discharged (*f*).

(*a*) *Friend v. Young* [1897] 2 Ch. 421 ; *London and Midland Bank v. Mitchell* [1899] 2 Ch. 161.

(*b*) *Paradine v. Jane* (1646) Aleyn, 26 ; *Hong Kong, &c. Dock Co. v. Netherton Shipping Co.* (a Scotch case) [1909] S. C. 34.

(*c*) *Baily v. De Crespigny* (1869) L. R. 4 Q. B. 180.

(*d*) *Robinson v. Davison* (1871) L. R. 6 Ex. 269.

(*e*) *Taylor v. Caldwell* (1863) 3 B. & S. 826 ; *Nickoll and Knight v. Ashton & Co.* [1901] 2 K. B. 126 ; *Krell v. Henry* [1903] 2 K. B. 740.

(*f*) *O'Neil v. Armstrong* [1895] 2 Q. B. 418 ; *The Blairmore* [1898] A. C. 593.

Generally speaking, and subject to the above exceptions, the mere inability of one of the parties to perform his liability under the contract, does not operate as a discharge of the contract.

Sub-section (10).—*Construction of Contracts.*

Questions frequently arise as to the exact meaning of the words of a contract. It is for the Court to interpret such words in each particular case; but certain general rules of construction have gradually been established, which apply to all contracts.

The primary thing to be considered is, what was the true intention of the parties; and in order to ascertain this intention, the Court will carefully scrutinise the exact terms of the contract. If such terms are quite clear and unambiguous, the Court will not go outside them, notwithstanding that it may be alleged that the intention of the parties was otherwise (*a*); except, of course, in cases where the parties may be on proper grounds entitled to rectification of a written contract, as not expressing their actual agreement. Where the terms are ambiguous, such ambiguity is either 'patent' or 'latent.' A patent ambiguity is one apparent on the face of a written document, as in the case of a bill of exchange, the amount of which is stated in words as 'two hundred pounds,' but in figures as '245*l*.' (*b*). In such cases, the Court will not receive extrinsic evidence to explain the intention of the parties. A latent ambiguity occurs where some doubt arises, not from the words themselves, but from their application to the parties or the subject-matter; *e.g.*, where two persons have the same name, or where a purchaser has agreed to buy wool which he

(*a*) *Henderson v. Arthur* (1839) 5 Bing. N. C. 425. Cf. [1907] 1 K. B. 10.  
 (*b*) *Sanderson v. Piper* s. 9 (2).  
 Bills of Exchange Act, 1882.

described simply as 'your wool' (a). In this class of cases, extrinsic evidence is admissible to show the intention of the parties.

The leading rule of construction, therefore, is : "that the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnancy or inconsistency with the rest of the instrument ; in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no further " (b). But regard must be had to the whole agreement ; and particular expressions must be construed in the light of their context (c).

Another rule is : that general words must be construed in application to the particular purpose for which they are used. Hence, general words following an enumeration of specific things are usually construed as restricted to things of the same kind (*ejusdem generis*) as those specifically enumerated (d).

Again, the construction must as far as possible be favourable, *i.e.*, such as to support the validity of the contract ; on the principle : *ut res magis valeat quam pereat* (e). On somewhat the same principle, the construction must be reasonable, and not necessarily in all cases literal (f). It must also be noticed, that trade or local custom may be proved, by way of supplementing or interpreting the terms of a contract, but not of contradicting them (g). In such cases the

(a) *Macdonald v. Longbottom* (1859) 1 E. & E. 977.

(b) *Per* Lord WENSLEYDALE, in *Grey v. Pearson* (1857) 6 H. L. C. 61 ; *McCowan v. Baine* [1891] A. C. 401.

(c) *Monypenny v. Monypenny* (1860) 9 H. L. C. 114.

(d) *Thames Insurance v. Hamilton* (1887) L. R. 12

App. Ca. 484.

(e) *Roe v. Trammar* (1758) Willes, 682.

(f) *Rawlinson v. Clarke* (1845) 14 M. & W. 187.

(g) *Wigglesworth v. Dallison* (1779) 1 Douglas, 201 ; *Smith v. Wilson* (1832) 3 B. & Ad. 728 ; *Tucker v. Linger* (1883) L. R. 8 App. Ca. 508.

presumption is, if the contract is not inconsistent with the usages of the trade or locality, that “the parties “did not mean to express in writing the whole of the “contract by which they intended to be bound, but to “contract with reference to those known usages” (a).

Finally, there is a rule, only applicable if all other rules fail, that an ambiguity of expression must be construed rather against the party using it than against the other party; according to the maxim: *verba fortius accipiuntur contra proferentem* (b).

### Sub-section (11).—*Remedies for Breach of Contract.*

(A) *Action for damages.*—This is the ordinary common law remedy. The principle upon which it is based is: that if one party breaks a contract, he ought to make pecuniary compensation to the other party to such an extent that the latter may, “so far as “money can do it, be placed in the same situation as if “the contract had been performed” (c). The measure of damages is, therefore, in general, the value of the performance to the plaintiff, and not what it would have cost the defendant to perform the contract (d). The presumption, in all cases, is against the wrongdoer. “Every reasonable presumption may be made “as to the benefit which the other party might have “obtained by the *bonâ fide* performance of the agreement” (e). At the same time, generally speaking,

(a) *Hutton v. Warren* (1836) 1 M. & W. 466; *Re Walkers, Winsor & Hamm and Shaw* [1904] 2 K. B. 152.

(b) *Rodger v. Comptoir d'Escompte* (1869) L. R. 2 P. C. 406.

(c) *Per* PARKE, B., in *Robinson v. Harman* (1847) 1 Exch. 855; *Michael v. Hart* [1902] .

1 K. B. 482; *Wertheimer v. Chicoutimi Pulp Co.* [1911] A. C. 301.

(d) *Conquest v. Ebbetts* [1896] A. C. 490.

(e) *Per* LORD SELBORNE, L.C., in *Wilson v. Northampton Co.* (1874) L. R. 9 Ch. App. 286.

damages are restricted to the *proximate* consequences of the breach of contract. The rules on this point are commonly referred to as ‘the rules in *Hadley v. Baxendale*’ (a), which may be regarded as the leading case on the subject; though the principles laid down in it have been elucidated in many important and more recent decisions. The general rule was thus expressed in the leading case. “The damages in respect of a contract should be either such as fairly and reasonably may be considered as arising naturally, that is, according to the usual course of things, from such breach of contract; or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of such breach” (b). It follows that damages immediately and directly arising from the breach are always recoverable (c). But ‘special’ damage, arising from circumstances peculiar to the case, is only compensated if the party who is sought to be made liable had, at the time of contracting, notice of, and expressly or implicitly contracted on the basis of, such special circumstances. “In order that the notice may have any effect, it must be given under such circumstances as that an actual contract arises on the part of the defendant to bear the exceptional loss” (d). It is the duty of a person who suffers from a breach of contract to take all reasonable steps to mitigate the loss; and he cannot claim any compensation for loss which is due to his neglect to take such steps. And if the action which he has taken has actually diminished his loss, such diminution may be taken into account; even though there was no duty

(a) (1854) 9 Exch. 341.

136.

(b) *Ibid.*, at p. 354.(d) *Horne v. Midland Rail.*(c) *MacMahon v. Field* (1881) 7 Q. B. D. 591; *Ashworth v. Wells* (1898) 78 L. T.*Co.* (1873) L. R. 8 C. P. 131; *Agius v. Great Western Coll. Co.* [1899] 1 Q. B. 413.

on him so to act (a). In the case of a breach of a contract to pay a sum of money, no damages are recoverable except the sum itself, together with interest in certain cases (b).

(B) *Action for specific performance*.—This is an equitable remedy; but, under the Judicature Act, 1873 (c), can now be given in all divisions of the High Court. The remedy is still, however, only available on equitable principles; and is not granted where the ordinary remedy by action for damages is available and adequate. For instance, specific performance will not be ordered of a contract to lend money (d), except a contract to take up and pay for debentures (e), or of any contract for personal services (f), or of any contract of which, on the ground of hardship, uncertainty in ability to enforce it, or otherwise, the Court of Chancery would not formerly have decreed specific performance (g). With regard to contracts for the sale of goods, the power to grant specific performance of these is expressly conferred by the Sale of Goods Act, 1893 (h); but the jurisdiction is exercised only in exceptional cases.

(c) *Injunction*.—Where a contract involves a negative obligation, the Court will, in a proper case, restrain a breach of it by an injunction, violation of which will expose the party to committal for contempt of court. An injunction will be granted where the contract contains a negative stipulation in express terms (i);

(a) *British Westinghouse, &c. Co. v. Underground Electric Railways* [1912] A. C. 673.

(b) *Marzetti v. Williams* (1830) 1 B. & Ad. 415; *Wallis v. Smith* (1882) 21 Ch. D., at p. 257.

(c) S. 24.

(d) *South African Territories v. Wallington* [1898] A. C. 309.

(e) *Companies (Consolidation) Act*, 1908, s. 105.

(f) *Ryan v. Mutual Tontine Association* [1893] 1 Ch. 116.

(g) *Hope v. Walter* [1900] 1 Ch. 257; *Molyneux v. Richard* [1906] 1 Ch. 34.

(h) S. 52.

(i) *Lumley v. Wagner* (1852) 1 D. M. & G. 604;



and, apparently, now also where the contract, although affirmative in form, is negative in substance (*a*). It seems, however, that a contract relating to personal services will not be enforced by injunction; at any rate unless there is an express, not merely an implied, contract not to do the act complained of, and such contract is reasonable (*b*).

(D) *Other remedies*.—There are various other subsidiary remedies applicable to special classes of contracts, *e.g.*, the right of a seller of goods to re-sell and to stop *in transitu*, and the right of lien which is given to sellers, carriers, innkeepers, &c. These are dealt with elsewhere in this work.

We have now to consider, in more detail, certain important classes of contracts, which, though generally governed by the rules described in this section, have distinguishing features which give them an individual character.

*Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 416.

(a) *Manchester Ship Canal Co. v. Manchester Racecourse Co.* [1901] 2 Ch. 37; *Metropolitan Electric Supply v. Ginder* [1901] *ibid.* 799.

(b) *Whitwood Chemical Co. v. Hardman*, *ubi sup.*; *Ehrmann v. Bartholomew* [1898] 1 Ch. 671; *Robinson v. Heuer* [1898] 2 Ch. 451; *Amber Size and Chemical Co. v. Menzel* [1913] 2 Ch. 239.

## CHAPTER V.—SECTION II.

## THE CONTRACT OF AGENCY.

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*General nature and modes of formation.*—The importance of the contract of agency lies in the fact that it may be ancillary to every other class of contract. Any person may enter into any kind of contract by means of an agent acting with his authority ; and the effect is, speaking generally, precisely the same as if he had personally been a party to the agreement.

In order to be valid as between the principal and the agent, the contract of agency must conform to the ordinary rules applicable to all other contracts. No particular form is necessary. But an authority to an agent to execute a deed must itself be given by a deed, which is commonly called a *power of attorney*. It is not, however, necessary (in order that the principal should be bound by the agent's acts) that the agent should possess capacity to bind himself by contract. Thus an infant may be an agent ; and, at a time when married women had no contractual capacity of their own, it was never doubted that a wife might be agent for her husband.

Agency is usually created by express agreement ; but it may also arise by implication from the circumstances and conduct of the parties. For instance, if a person sends goods to an auctioneer or factor, whose business it is to sell goods, he is presumed to authorise a sale of them (*a*), and thus to make the auctioneer or factor his agent for making a contract of sale.

(*a*) *Pole v. Leask* (1864) 33 L. J. Ch. 155 ; *Henderson v. Williams* [1895] 1 Q. B. 521.

Agency is sometimes implied by law from the relation of the parties, as in the case of the wife's 'agency of necessity' (a), and in the case of partners (b). It may also be presumed from the necessity of the occasion; as in the case of the master of a ship, who has implied authority to pledge the ship-owner's credit for the necessary means to prosecute the voyage (c). And although a person who purports to contract as agent for a principal, without actual or implied authority, cannot bind the principal without his consent, yet the principal may, by a subsequent ratification, become bound by and entitled to the benefit of the contract. Such a ratification dates back to the original making of the contract; and its effect is precisely the same as if the agent had been authorised to contract originally, in accordance with the principle—*omnis ratihabitio retrotrahitur ac mandato priori æquiparatur* (d). In order, however, that a ratification may be effectual, the following conditions must concur, i.e., (1) the agent must contract as agent (e); (2) he must have a principal in contemplation, and in actual existence, at the time of the contract (f); (3) the contract must be such as the principal was at the time legally capable of entering into (g); (4) the principal must, at the time of ratification, have full knowledge of all material facts relating to the contract ratified, or else he must intend the ratification to take effect whatever the facts were, and in spite of his ignorance as to them (h).

(a) See *post*, pp. 423—424.

(b) See *post*, sect. vi., pp. 193—194.

(c) *The Heinrich Bjorn* (1886) L. R. 11 App. Ca. 270; *The Savona* [1900] P. 252. And see, generally, *Gwilliam v. Twist* [1895] 2 Q. B. 84.

(d) *Bolton v. Lambert* (1889) 41 Ch. D. 295; *Dibbins v.*

*Dibbins* [1896] 2 Ch. 348; *Re Tiedemann* [1899] 2 Q. B. 66.

(e) *Keighley v. Durant* [1901] A. C. 240.

(f) *Kelner v. Baxter* (1866) L. R. 2 C. P. 174; *Brook v. Hook* (1871) L. R. 6 Ex. 89.

(g) *Ex parte Badman and Bosanquet* (1890) 45 Ch. D. 16.

(h) *Banque Jacques Cartier v.*

*Kinds of agents.*—Agents may be divided into two principal classes : (1) *general* agents and (2) *particular* or *special* agents. A general agent is one appointed to do a general class of acts, or to fill an appointment or position involving transactions of various kinds within the general scope of a certain business ; *e.g.*, the manager of a shop or factory, the superintendent of a railway, or the managing director of a company. A particular or special agent, on the other hand, is one appointed for a particular occasion or purpose only. The important difference between the two cases is with regard to the position of third persons with whom they deal. Such third persons are only concerned with the apparent, and not the actual, authority of a general agent. Therefore if a general agent, purporting to act on behalf of his principal, enters into a contract within the apparent scope of his employment, his principal is bound by the contract ; notwithstanding any express limitation of the agent's authority which is unknown to the third party with whom he has contracted (*a*). But, in the case of a particular agent, a third party contracting with him does so at his own peril ; unless he previously ascertains the exact extent of the agent's authority (*b*). Where, however, an agent contracts within the scope of his actual authority, the principal cannot repudiate the contract, on the ground that the agent was acting in his own, and not in the principal's interests (*c*) ;

*v. Banque d'Épargne* (1888) L. R. 13 App. Ca. 111 ; *Marsh v. Joseph* [1897] 1 Ch. 213.

(*a*) *Watteau v. Fenwick* [1893] 1 Q. B. 346 ; *Reid v. Rigby* [1894] 2 Q. B. 40 ; *Wright v. Glyn* [1902] 1 K. B. 745 ; *International Sponge Importers v. Watt* [1911] A. C. 279 ; *Fry v. Smellie* [1912] 3 K. B. 282. Cf. *Kinahan v.*

*Parry* [1910] 2 K. B. 389 ; [1911] 1 K. B. 459.

(*b*) *Brady v. Todd* (1861) 9 C. B. (N.S.) 592 ; *Bryant v. La Banque du Peuple* [1893] A. C. 170 ; *Jacobs v. Morris* [1902] 1 Ch. 816.

(*c*) *Hambro v. Burnand* [1904] 2 K. B. 10 ; *Lloyd v. Grace Smith & Co.* [1912] A. C. 716.

even though the extent of the authority was not known to the third party.

There are certain kinds of general agents to whom distinctive names are applied. The following are the chief instances :—

(i) *Factors*, who are agents to whom goods are entrusted, with a discretionary power of sale. Special provisions with regard to them are contained in the Factors Act, 1889 (a).

(ii) *Brokers*, who are agents employed to buy and sell goods or other property ; but not, as in the case of factors, entrusted with possession of the goods. Their authority is merely to negotiate and superintend the making of a bargain between two other persons. A broker employed in a particular trade or market has implied authority to contract according to the usages of the trade or place ; *e.g.*, a stockbroker is implicitly authorised to act according to the rules of the Stock Exchange (b). Neither factors nor brokers are, generally speaking, answerable for the due payment of the price by the party to whom they sell (c) ; but a factor may make sales as a *del credere* agent, receiving on that account a higher commission from his principal (d). In such a case he is responsible for the price of goods sold through his agency.

(iii) *Commission agents*, who are agents employed to buy or sell goods *as principals* in one country or market, for some person in another country or market, in consideration of a commission for their services (e). In this case no privity of contract is established between the principal and the third parties with whom

(a) See *post*, pp. 167—169 ; 15 Q. B. D. 388.  
*Hastings v. Pearson* [1893] 1 Q. B. 62.

(b) *Sutton v. Tatham* (1839) 10 A. & E. 27 ; *Levitt v. Hamblet* [1901] 2 K. B. 53.

(c) *Perry v. Barnett* (1885) 15 Q. B. D. 388.  
 (d) *Couturier v. Hastie* (1852) 8 Ex. 40, 56, 9 Ex. 102 ; *Sutton v. Grey* [1894] 1 Q. B. 285.

(e) *Ireland v. Livingston* (1871) L. R. 5 H. L. 407.

the agent deals ; and the principal is not personally liable to such third parties.

(iv) *Del credere agents*, who are agents for the purpose of a sale, and expressly or implicitly warrant to their principals the payment of monies due under contracts procured through their agency. Their undertaking is not a guarantee in the strict sense, and therefore need not be in writing under the Statute of Frauds (a).

(v) *Auctioneers*, who are agents with authority to sell property by public auction. If they are employed to sell goods, they have the goods in their possession. They can sell in their own name ; but are not authorised to give a warranty of the goods (b). They are entitled to an indemnity from the owner of the goods against the consequences of acting upon his authority ; and they have a lien upon the goods sold, and upon the price, for their charges and commission.

Other familiar instances of general agents are *house and estate agents* (c), *ship brokers*, *insurance brokers*, *ship-masters*, and *partners* (who are agents of the firm).

*Legal effect of contracts made by agents.*—Where an agent contracts with a third person, the precise legal effect differs according to circumstances. The following three different classes of cases may exist. First, the agent may contract as such for a named principal. In this case the agent is a mere conduit pipe ; and, having acted as such, he immediately drops out of the transaction, the principal being solely liable on, and capable of enforcing, the contract (d). But there is an exception from this rule where the agent buys goods in England for a foreign principal ; in which case, by mercantile custom, the agent is usually personally

(a) *Couturier v. Hastie* 2 Q. B. D. 355.  
 (1852) 8 Exch. 40 ; *Gabriel v. Churchill* (1913) 30 T. L. R. 90.  
 (c) *Rosenbaum v. Belson* [1900] 2 Ch. 267.  
 (d) *Ellis v. Goulton* [1893] 1 Q. B. 350.  
 (b) *Woolfe v. Horn* (1877)

liable to the seller of the goods on the contract (*a*). Similarly, an agent who contracts by a deed, in which his principal is not expressly named as a party, incurs personal responsibility (*b*). So too, where a marine policy of insurance is effected on behalf of the assured by a broker, the latter is directly responsible to the insurer for the premium (*c*). And if an agent signs a bill of exchange in his own name, and not in the name of his principal, the agent, and not the principal, is liable on the bill (*d*).

Second, the agent may contract for a principal whose existence is disclosed, but not his name. In this case, if the agent expressly contracts as agent, and not so as to pledge his own personal credit, the principal, and not he, is the one to sue and be sued on the contract. But, on the other hand, if there is nothing on the face of the contract to show that he acts only as agent, he is *primâ facie* liable; and the third party can elect whether to treat him or the principal as the person responsible upon the contract (*e*). Evidence of custom may, however, in the former case, be given to show that the agent is intended to be bound (*f*).

Third, the agent may contract in his own name, without disclosing either the name or existence of the principal. In this case, the other party to the contract has the option, within a reasonable time after ascertaining the identity of the principal, to elect to treat either the agent or the principal as the person with whom he contracted (*g*). But, having once exercised his option

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| ( <i>a</i> ) <i>Hutton v. Bullock</i> (1874) | (1829) 9 B. & C. 78; <i>Paice v.</i>        |
| L. R. 9 Q. B. 572; <i>Malcolm v.</i>         | <i>Walker</i> (1870) L. R. 5 Ex. 173.       |
| <i>Hoyle</i> (1894) 63 L. J. Q. B. 1.        | ( <i>f</i> ) <i>Barrow v. Dyster</i> (1884) |
| ( <i>b</i> ) <i>Re Pickering</i> (1871)      | 13 Q. B. D. 635; <i>Pike v.</i>             |
| L. R. 6 Ch. App. 525.                        | <i>Ongley</i> (1887) 18 Q. B. D.            |
| ( <i>c</i> ) Marine Insurance Act,           | 708.  |
| 1906, s. 53.                                 | ( <i>g</i> ) <i>Paterson v. Gandasequi</i>  |
| ( <i>d</i> ) Bills of Exchange Act,          | (1812) 15 East, 62; <i>Watteau</i>          |
| 1882, ss. 23, 26, 91 (1).                    | <i>v. Fenwick</i> [1893] 1 Q. B. 346.       |
| ( <i>e</i> ) <i>Thomson v. Davenport</i>     |   |

by some unequivocal act, he must abide by it. And if the third party has, by his conduct or representations, induced the principal to prejudice himself, under the belief that the third party has given credit in the matter to the agent personally, he cannot afterwards sue the principal (a).

In any of the above cases in which an agent contracts in his own name for an undisclosed principal, and the principal afterwards sues to enforce the contract against the third party, the latter may set off a debt due from the agent to himself (b). This is on the ground that "the agent has been permitted by the principal to hold himself out as the principal, and that the person dealing with the agent has believed that the agent was the principal, and has acted on that belief" (c). This principle applies to factors and similar agents; but cannot readily apply to brokers (d).

*Liability of an unauthorised agent.*—Even if a person purports expressly to contract as agent for a named principal or otherwise, he is personally liable if either he had no actual authority at all or exceeded his authority (e), or the authority has determined (f). *A fortiori* he is liable, if the alleged principal was not in

(a) *Heald v. Kenworthy* 114.

(1855) 10 Exch. 745; *Irvine v. Watson* (1880) 5 Q. B. D. 414; *Davison v. Donaldson* (1882) 9 Q. B. D. 623.

(b) *George v. Clagett* (1797) 7 T. R. 359.

(c) *Cooke v. Eshelby* (1887) L. R. 12 App. Ca. 271.

(d) *Fish v. Kempton* (1849) 7 C. B. 687; *Montagu v. Forwood* [1893] 2 Q. B. 350.

(e) *Collen v. Wright* (1857) 8 E. & B. 647; *Halbot v. Lens* [1901] 1 Ch. 344; *Starkey v. Bank of England* [1903] A. C.

(f) *Yonge v. Toynbee* [1910] 1 K. B. 215. It was held in *Smout v. Ilbery* (1843) 10 M. & W. 1, that a widow who, in ignorance of her husband's death, purported to contract on his behalf, did not render herself liable. This case must be regarded as overruled by *Yonge v. Toynbee*, in so far as it proceeds on the principle that ignorance of the termination of the authority is a defence to an action founded on warranty of authority.



existence (a). In all such cases, the agent is implied by law to have warranted that he had authority; and is therefore liable in damages, whether he acted fraudulently or innocently in the matter (b). This rule does not, however, apply to a contract made by a public servant as agent for the Crown (c).

*Duties of an agent.*—As between himself and his principal, an agent must strictly adhere to his instructions, and not exceed the authority given to him. He must use due diligence in carrying out his agency. In accordance with the maxim: *delegatus non potest delegare*, he must not delegate his authority, at all events except so far as to obtain merely ministerial assistance, or to employ qualified sub-agents, in cases where the nature of the business implies an authority to do so (d). The right to delegate on the ground of urgent necessity may also sometimes arise; but is confined to certain well-recognised cases, such as the master of a ship (e). The agent must account fully to his principal for the subject-matter and profits of his agency; and in particular must not make any secret profit, whether in the shape of a bribe, or surreptitious commission, or otherwise (f). This, of course, applies to directors of a company, who are, in law, agents of the company (g); but where a company acts as agent

(a) *Kelner v. Baxter* (1866) L. R. 2 C. P. 174; *Simmons v. Liberal Opinion* [1911] 1 K. B. 966.

(b) *Firbank v. Humphreys* (1886) 18 Q. B. D. 54.

(c) *Dunn v. Macdonald* [1897] 1 Q. B. 401, 555.

(d) *De Bussche v. Alt* (1878) 8 Ch. D. 310; *Brown v. Tombs* [1891] 1 Q. B. 253; *Bell v. Balls* [1897] 1 Ch. 133.

(e) *Gwilliam v. Twist* [1895] 2 Q. B. 84.

(f) *Salford Corporation v. Lever* [1891] 1 Q. B. 168; *Skelton v. Wood* (1895) 71 L. T. 616; *Shipway v. Broadwood* [1899] 1 Q. B. 369; *Grant v. Gold Exploration Syndicate* [1900] 1 Q. B. 233; *Erskine v. Sachs* [1901] 2 K. B. 504; *Stubbs v. Slater* [1910] 1 Ch. 632.

(g) *Archer's Case* [1892] 1

for an individual, the company may employ and remunerate its directors for the purpose of carrying out the agency, charging him the cost of such remuneration (a). The giving and receiving of bribes or illicit commissions are made criminal offences by the Prevention of Corruption Act, 1906; and even at common law render both giver and receiver liable to a civil action (b). Moreover, an agent who corruptly receives such a commission will forfeit his claim to his ordinary commission from his principal (c). An agent who is employed to buy goods must not sell his own goods to the principal without disclosing the facts to him (d).

*Rights of an agent against his principal.*—An agent is entitled to the commission or remuneration, if any, agreed on; and he has an implied right to be fully reimbursed and indemnified by the principal in respect of all reasonable expenses and liabilities properly incurred in carrying out the agency (e). This does not, of course, apply where by express statute the right is excluded, e.g., by the Gaming Act, 1892 (f). In certain cases, also, an agent may have a *lien* upon the subject-matter or proceeds of the agency, for his commission and expenses, e.g., in the case of auctioneers, brokers, factors, masters of ships, &c. (g).

Ch. 322; *In re London and South Western Canal Co.* [1911] 1 Ch. 346.

(a) *Bath v. Standard Land Co.* [1911] 1 Ch. 618, dissentiente FLETCHER MOULTON, L.J.

(b) *Salford Corporation v. Lever*, *ubi sup.*

(c) *Andrews v. Ramsay* [1903] 2 K. B. 635; contrast *Hippisley v. Knee* [1905] 1 K. B. 1.

(d) *Robinson v. Mollett*

(1874) L. R. 7 H. L. 802; *Johnson v. Kearley* [1908] 2 K. B. 514. But see *Aston v. Kelsey* [1913] 3 K. B. 314.

(e) *Betts v. Gibbins* (1834) 2 A. & E. 57; *Perry v. Barnett* (1885) 15 Q. B. D. 388.

(f) *Levy v. Warburton* (1901) 70 L. J. K. B. 708.

(g) *Webb v. Smith* (1885) 30 Ch. D. 192; Merchant Shipping Act, 1894, s. 167; *Re London and Globe Corporation* [1902] 2 Ch. 416.

*Termination of agency.*—The authority of an agent is, in general, revocable by the principal at any time before it is executed. But if the authority is ‘coupled with an interest,’ *i.e.*, given for the purpose of securing some benefit to the agent, it is irrevocable (*a*). In any case, a revocation of the authority of a person who has been clearly held out by the principal as an agent for him, is not effective as against third persons afterwards dealing with the agent without notice of the revocation (*b*). Special provisions as to making a *power of attorney* irrevocable are contained in the Conveyancing Act, 1881 (*c*), and the Conveyancing Act, 1882 (*d*). The authority of an agent, although coupled with an interest, is also revoked by the death of the principal, even though he does not know of it (*e*); except in cases which fall within the Conveyancing Acts. The bankruptcy of the principal, and the dissolution of a company which is principal, have the same effect; except as to dealings with the agent without notice of the bankruptcy or dissolution (*f*). It has recently been held, that the retainer of a solicitor for purposes of litigation is determined by the insanity of the client, though the solicitor is ignorant of the insanity (*g*); but, if the principle of this decision is applicable to agency generally, it is inconsistent with an earlier case in which a husband was held liable, on recovering his sanity, for contracts made on his behalf while he was insane (*h*).

(*a*) *Smart v. Sandars* (1848)  
5 C. B. 895; *In re Hannan's*,  
&c. Co. [1896] 2 Ch. 648.

(*b*) *Trueman v. Loder*  
(1840) 11 A. & E. 589; *Willis*  
*v. Joyce* (1912) 27 T. L. R.  
388.

(*c*) S. 47.

(*d*) Ss. 8, 9.

(*e*) *Watson v. King* (1815)

4 Camp. 272.

(*f*) *Ex parte Snowball* (1872)  
L. R. 7 Ch. 534; *Salton v.*  
*New Beeston Cycle Co.* [1900]  
1 Ch. 43.

(*g*) *Yonge v. Toynbee* [1910]  
1 K. B. 215.

(*h*) *Drew v. Nunn* (1879)  
4 Q. B. D. 661.

## CHAPTER V.—SECTION III.

## THE CONTRACT OF SALE OF GOODS.

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THE contract of sale was defined by the old writers as a contract whereby the property in goods is transmuted from one man to another for a price (*a*). For if the commutation be of goods for goods, it is more properly an *exchange*; but if it be a transferring of goods for money, it is called a *sale*, which is a method of exchange introduced for the convenience of mankind.

*What is a contract of sale?*—The law of sale of goods is now regulated and codified by the Sale of Goods Act, 1893. By that Act a contract of sale of goods is defined as “a contract whereby the seller transfers or “agrees to transfer the property in goods to the buyer “for a money consideration called the price” (*b*). Thus it will be seen that the definition includes two perfectly distinct though (in some cases) simultaneous events, viz., the negotiation for a transfer of property and the actual transfer of that property. This fact is recognised by the Sale of Goods Act; and, accordingly, where, under a contract of sale, the property in the goods is actually transferred from the seller to the buyer, the contract is called a ‘sale’; where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an ‘agreement to sell’ (*c*).

(*a*) Noy, *Max.* 42.

(*c*) S. 1 (2).

(*b*) S. 1 (1).

The term 'goods' as defined by the Sale of Goods Act, 1893 (a), comprises "all chattels personal, other than things in action and money"; and thus includes "emblemments, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale, or under the contract of sale" (b).

*When the property vests in purchaser.*—The rules as to when the property in the goods sold legally vests in the buyer are stated in sections 16 to 20 of the Act. They may be shortly summarised as follows.

(a) The property in unascertained goods does not pass to the buyer until the identity of the goods is ascertained. Goods in bulk (e.g., so many hundred-weight of sugar) are for this purpose "ascertained," if and when the agreed quantity has been set apart and unconditionally appropriated to the contract, by one party with the assent of the other party.

(b) The property in specific or ascertained goods passes when the parties agree it shall pass; but in the absence of special agreement the following rules govern.

(i) If specific goods ready for delivery are sold under an unconditional contract, the property vests in the purchaser as soon as the contract is made; but if something remains to be done to such goods to render them deliverable, the property does not pass until this is done, and the buyer has notice of the fact (c).

(ii) Where specific goods are sold in a deliverable state, but subject to their being weighed, measured, or tested for the purpose of ascertaining the price (e.g., if A. sells to B. all the sugar, of unascertained amount, in a particular warehouse, at so much per

(a) S. 62.

1 K. B. 357.

(b) As to things attached to or forming part of the land, see *Morgan v. Russell* [1909]

(c) *Laing v. Barclay* [1908] A. C. 35.

hundredweight), the property does not pass until the price is so ascertained, and the buyer has notice of it.

(iii) If goods are delivered 'on approval,' or 'on sale or return,' the property passes to the buyer as soon as he either signifies his acceptance, or does any other act adopting the transaction, *e.g.*, retains the goods without notice of rejection beyond the time limited for their return, or for an unreasonable time (*a*).

(iv) If the seller in any case, notwithstanding delivery, reserves the right of disposal of the goods until some condition is fulfilled, the property does not pass until such condition is in fact fulfilled.

The question of the time at which the property vests in the purchaser is very material, as determining who shall bear the loss in case the goods are accidentally destroyed after the contract of sale, but before delivery to the purchaser. It may also be very material in cases where the purchaser has resold the goods to a third person.

It must be borne in mind, however, that there is a great distinction between the vesting of the property in goods and the vesting of the right to the possession thereof; for in the case of a sale of specific and finished goods for ready money, the purchaser cannot take the goods until he pays or tenders the whole price agreed on (*b*). But if he tenders the money to the vendor, and the latter refuses it, the purchaser may have an action against the vendor for detaining the goods. For the goods are his (the purchaser's) property; and his right to them is subject only to the payment of the price.

(*a*) *Kirkham v. Attenborough* [1897] 1 Q. B. 201; *Genn v. Winkel* (1912) 28 T. L. R. 483. (But see *Weiner v. Gill* [1906] 2 K. B. 574, as to what is meant by 'on approval' or 'on sale or return.')

(*b*) Sale of Goods Act, 1893, s. 28.

*Form of contract.*—By section 4 of the Sale of Goods Act, 1893 (re-enacting, with slight alterations, section 17 of the Statute of Frauds (*a*)), it is provided that no contract for the sale of any goods of the value of £10 or upwards shall be enforceable by action, unless the buyer shall either : (1) accept part of the goods, and actually receive the same (*b*) ; or (2) give something in earnest to bind the bargain, or in part payment (*c*) ; or (3) unless some memorandum or note in writing of the bargain be made and signed by the party to be charged, or his agent in that behalf. If for any reason the contract also falls within section 4 of the Statute of Frauds (*d*), it is not enough to comply with the Sale of Goods Act ; the Statute of Frauds must also be complied with. Thus, for example, an oral contract to deliver goods over a period extending beyond a year cannot be enforced ; even though there has been acceptance of part of the goods by the buyer (*e*).

It is further provided by the Sale of Goods Act (*f*), that the requisites above stated shall apply to every contract for the sale of goods of the value aforesaid ; notwithstanding that the goods may be intended to be delivered at some future time, or may not, at the time of the contract, be actually made, procured, or provided, or fit or ready for delivery, or that some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

Further, it is to be observed, that where the contracting parties rely on the memorandum or note in writing, such memorandum or note must be of the same kind as required in the case of the like

(*a*) 29 Car. 2 (1677) c. 3.

(*b*) *Taylor v. Smith* [1893] 2 Q. B. 65 ; *Abbott v. Wolsey* [1895] 2 Q. B. 97.

(*c*) *Walker v. Nussey* (1847) 16 M. & W. 302.

(*d*) See *ante*, pp. 101–103.

(*e*) *Prested Miners, &c. Co.*

*v. Garner* [1911] 1 K. B. 425.

(*f*) S. 4 (2), re-enactings. 7 (now repealed) of the Statute of Frauds Amendment Act, 1828.

memorandum or note under the fourth section of the Statute of Frauds, and must contain all the essential terms of the contract (*a*) ; except that, where no price is fixed by the parties, a promise to pay a reasonable price will be implied (*b*). On a sale of goods by auction, the auctioneer may in general sign as agent for the buyer as well as for the seller ; where such sales are (as they usually are) required to be evidenced by a memorandum or note in writing (*c*).

*Lien and stoppage in transitu.*—The unpaid seller of goods who is in possession of them is entitled (subject to the provisions of the Act) to retain possession of them until payment or tender of the price—(i) where the goods have been sold without any stipulation as to credit, (ii) where the goods have been sold on credit but the term of credit has expired, (iii) where the buyer becomes insolvent (*d*). This right (which is known as the seller's right of 'lien') is lost (i) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer, without reserving the right of disposal of the goods, (ii) when the buyer or his agent lawfully obtains possession of the goods, and (iii) by waiver of the right (*e*).

If the vendor of goods transmits them to the vendee, without receiving payment of the price, and afterwards becomes apprised that the vendee is insolvent, the law allows the vendor the privilege of stoppage *in transitu* ; that is to say, the law entitles the vendor, while the goods are still in their transit, and not yet delivered to the purchaser, to resume possession of them, and retain them until payment or tender of the price (*f*). The

(*a*) *Ante*, pp. 102–103.

(*b*) *Hoadley v. McLaine* s. 41.  
(1834) 10 Bing. 482.

(*c*) *Bell v. Balls* [1897] 1  
Ch. 670.

(*d*) Sale of Goods Act, 1893,

s. 41.

(*e*) *Ibid.* s. 43 ; *Poulton v.*  
*Anglo-American Oil Co.* (1911)  
27 T. L. R. 216.

(*f*) Act of 1893, s. 44 ;



question as to the exact time during which goods are deemed to be *in transitu*, depends on the circumstances of each case; but, generally speaking, the period of transit is deemed to continue until the goods have actually reached the hands of the buyer himself, or of a person who agrees to hold them on behalf of him, or until the carrier has wrongfully refused to deliver the goods to such a person (*a*). The right of stoppage will not be affected by the vendor having consigned the goods to the purchaser under a bill of lading (*b*); but if any person to whom the bill has been lawfully transferred, as buyer or owner, transfers the document to a third party, who takes it in good faith and for valuable consideration, the right of such third party is paramount to the unpaid vendor's lien or right of stoppage *in transitu* (*c*). Such a transfer, if by way of sale, defeats the right of stoppage *in transitu* absolutely; if it be by way of pledge or charge only, the right of the unpaid vendor is not defeated thereby, but can only be exercised subject to the pledge or charge (*d*). And, generally, the exercise by the vendor of his right of stoppage *in transitu* does not operate of itself to rescind the contract; unless the seller resells the goods, as, in certain cases, he is entitled to do (*e*).

*Acquisition of title.*—Though, in general, it is only from the owner that any property in goods can be derived, yet goods may, in certain cases, be effectually transferred to a purchaser by one who has himself no title to them. The most important cases of this

*Wentworth v. Outhwaite* (1842)  
10 M. & W. 436.

(*a*) Act of 1893, s. 45.

(*b*) The Bills of Lading Act,  
1855, s. 2.

(*c*) Act of 1893, s. 47; *Lick-*

*barrow v. Mason* (1788) 2 T. R.  
63.

(*d*) Act of 1893, s. 47;  
*Sewell v. Burdick* (1885) L. R.  
10 App. Ca. 74.

(*e*) Act of 1893, s. 48.

kind are sales in market overt, and sales by factors and others under the Factors Act, 1889.

*Sales in market overt.*—A sale in *market overt* is not only good between the parties, but also is binding on all those that have any right of property in the thing sold therein (a). [*Market overt*, in the country, is a market held on the special days provided as market days, for particular towns, by charter or prescription ; but in the City of London every day, except Sunday, is a market day (b). The market place, or spot of ground set apart by custom for the sale of particular goods, is also, in the country, the only market overt ; but in the City of London every shop in which goods are exposed publicly for sale is a market overt, though only for such things as the owner ordinarily trades in there (c). But to the general rule as to the binding effect of a sale in market overt, there are certain exceptions.

First, if the goods be Crown property, such a sale will not bind the Crown. Second, if the sale is not *bonâ fide*—e.g., if the buyer knows the property not to be in the seller, or if he knows the seller to be an infant or under other disability, or if the sale be not originally and wholly made in the market, or not at the usual hours (d)—in any of these cases, the sale is not binding. Third, if a man buys his own goods in a market, the sale shall not bind him, unless the property had been previously altered by a former sale (e) ; and, notwithstanding any number of intervening sales, if the original vendor, who sold without

(a) Act of 1893, s. 22.

(b) *Taylor v. Chambers* (1605) Cro. Jac. 68.

(c) *Case of Market Overt* (1596) 5 Rep. 83 ; *Hargreave v. Spink* [1892] 1 Q. B. 25 ;

*Clayton v. Le Roy* [1911] 2 K. B. 1031.

(d) 2 Inst. 713, 714.

(e) *Perkins, Profitable Book*, s. 93.

[having the property, should come again into possession of the goods, the original owner may take them when found in his hands who was guilty of the first breach of justice (a). By these wise regulations, the law has secured the right of the proprietor in personal chattels from being improperly divested ; so far at least as is consistent with that other necessary policy, that *bonâ fide* purchasers in an open and regular manner shall not be afterwards put to difficulties by reason of the previous knavery of the seller.] Fourth, where there has been a *bonâ fide* purchase in market overt of property *stolen* from its former owner, the former owner may prosecute the offender to conviction ; and thereupon the property in the goods will re-vest in him (whether he has or has not obtained an order for restitution from the convicting judge), notwithstanding the intervening sale in market overt (b). The *bonâ fide* purchaser in such a case will receive only such (if any) compensation, out of the property of the thief, as the convicting judge may direct (c).

If my goods are stolen, or in any other way wrongfully taken from me, and sold otherwise than in market overt, my property therein is not altered ; and I may re-take them wherever I find them, even from an innocent purchaser (d). On the other hand, where the acquisition from me was voidable only (as in cases of fraud (e)), and a *bonâ fide* purchaser acquired the goods before I elected to avoid the transaction, such purchaser will have a good title ; and I cannot re-take the

(a) 2 Inst. 713.

(b) Act of 1893, s. 24. There is no re-vesting of property in cases where the goods were obtained merely by fraud. (The Criminal Appeal Act, 1907, s. 6, suspends the re-vesting for ten days, or until the hearing of an

appeal.)

(c) Criminal Law Amendment Act, 1867, s. 9.

(d) Act of 1893, s. 23 ; *Cundy v. Lindsay* (1878) L. R. 3 App. Ca. 459 ; *Farquharson v. King* [1902] A. C. 325.

(e) *Tilley v. Bowman* [1910] 1 K. B. 745.

goods (a). If I deny the *bona fides* of the purchaser, the burden of proof is on me (b). It has been enacted by the Pawnbrokers Act, 1872, that a person suspecting any article of which he is the owner to have been unlawfully pawned, and on oath satisfying a Justice that there is good cause and probable ground for such suspicion, may obtain a warrant for searching the house of the pawnbroker ; and if on such search the goods shall be found, and the property of the claimant proved, he will be entitled to have them restored (c).

[With regard to *horses*, a purchaser gains no property in one which has been stolen, unless he not only buys it in a fair or market overt, but also in accordance with the directions of the statutes of Philip and Mary and of Elizabeth (d) ; by which it was enacted, in effect, that a horse so purchased must have been openly exposed in the time of such fair or market for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable, and that even such sale should not take away the property of the owner, if, within six months after the horse was stolen, he put in his claim before some magistrate in the place where the horse was found, and within forty days more after such claim proved his property, by the oath of two witnesses, and tendered to the person in possession such price as the latter *bonâ fide* paid for the horse in market overt (e).]

*Sales under the Factors Act, 1889.*—At common law, if a factor or broker (f), or any agent entrusted

(a) *Babcock v. Lawson* c. 7 ; 31 Eliz. (1588) c. 12 ; 2 (1879) 4 Q. B. D. 394. Inst. 713 ; Act of 1893, s. 22.

(b) *Whitehorn v. Davison* (e) Com. Dig. *Market* (E) ; [1911] 1 K. B. 463. *Lee v. Bayes* (1856) 18 C. B. 599.

(c) Pawnbrokers Act, 1872, s. 36 ; *Singer Manufacturing Co. v. Clark* (1880) 5 Ex. D. 37. (f) As to who are factors or brokers, see *ante*, pp. 152–153.

(d) 2 & 3 Ph. and M. (1555)

with the possession of goods, disposed of them to a stranger in a way not warranted by the nature of his authority, or if he pledged them when authorised only to sell, the title so derived from him would have been ineffectual against his principal (a). But, for the protection of third persons dealing with factors and other persons entrusted with the possession of goods, or with the written *indicia* of property therein, various statutes were passed in the course of the nineteenth century, of which the chief now in force is the Factors Act, 1889; which last-mentioned Act is of such importance in the law of mercantile contracts, that some detailed statement of its provisions may here be acceptable.

The Act, then, deals with the powers of "a mercantile agent, having in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods" (b); and its chief object is, as we have said, to protect persons who deal with such agents. With this object, it provides, that any disposition by such a person, in the ordinary course of business, either of the goods or of the documents of title to goods, with which he has been entrusted, shall, so far as his principal is concerned, be unimpeachable on the ground that he (the agent) exceeded his authority; provided that the person taking under such disposition has acted *bonâ fide*, and has given value (c). But there is a special provision that when a factor pledges the goods of his principal to secure an *existing* debt, already due from the factor to the pledgee, the latter shall acquire no further right to the goods than could have been

(a) *Daubigny v. Duval* (1794) 5 T. R. 604.      *Mehta v. Sutton* (1913) 29 T. L. R. 185.

(b) *Weiner v. Harris* [1910] 1 K. B. 285; *Turner v. Sampson* (1911) 27 T. L. R. 200;      (c) Factors Act, 1889, ss. 2, 3.

enforced by the factor at the time of the pledge (a) ; and another that, where goods are pledged by a factor in consideration of the delivery of other goods or documents of title to goods, or a negotiable security, the pledgee will acquire no interest in the goods so pledged in excess of the value of the goods or security when so delivered or transferred in exchange (b). It is, however, now settled, that a pledge made by a factor who had only authority to sell, is protected by the Act (c).

The Act, however, is not confined to the subject of factors ; for it provides that a seller of goods who retains the goods or the documents of title thereto, and, conversely, a buyer of goods who obtains possession of the goods or the documents of title with the consent of the seller, can, in effect, as against the other party to the sale, confer on a person who deals in good faith with him a title to the goods (d). These provisions have been re-enacted by the Sale of Goods Act, 1893 (e) ; but it does not appear that they have been repealed from the Factors Act.

*Implied warranties and conditions.*—Apart from the question of what title in fact passes to the buyer of goods by a sale, there arises the further question what liability for defects of title or other defects a seller of goods incurs. Such liabilities may be either *express*, i.e., the result of actual arrangement between the parties, or *implied*, i.e., imposed by law in the absence of actual agreement to the contrary. And both may be either in the nature of *conditions* or of *warranties* ; the differences between which are important.

(a) Factors Act, 1889, s. 4.

(b) *Ibid.* s. 5.

(c) *Oppenheimer v. Attenborough* [1908] 1 K. B. 221 ;  
*Weiner v. Harris* [1910] 1

K. B. 285, overruling *Hastings v. Pearson* [1893] 1 Q. B. 62.

(d) Factors Act, 1889, ss. 8,

9.

(e) S. 25.

A condition is a term in a contract, the breach of which gives the other party a right to treat the contract as at an end ; a warranty (as has been before explained) (*a*) is a collateral or ancillary agreement by the seller, breach of which merely entitles the buyer to damages (*b*). Thus, if I sell B. a horse on the express stipulation that, if he turns out not to be sound, B. may return him and recover the price, that stipulation creates a condition. But if I merely warrant the horse sound, and he proves unsound, B. can only obtain damages from me for breach of my undertaking. With this explanation, we proceed to set out the conditions and warranties implied in a contract for the sale of goods.

And first, with regard to the title obtained by the buyer, the Sale of Goods Act, 1893, provides (*c*) that, in the absence of contrary expression or implication, there are, in a contract of sale, an implied *condition* that the seller has a right to sell, and implied *warranties* for quiet possession and freedom from undisclosed incumbrances.

With regard to quality or fitness, the Act provides that the seller of goods shall incur considerable liabilities, which, on account of their importance, it will be well to set out *seriatim* :

(i) Upon a contract for the sale of goods by description, there is an implied *condition* that the goods shall correspond with the description ; and this is so, even when the sale is by sample as well as by description (*d*).

(ii) Where the buyer expressly or implicitly makes known to the seller the particular purpose for which

(*a*) See *ante*, p. 132.

(*b*) Sale of Goods Act, 1893, ss. 11 (*b*), 62.

(*c*) S. 12 ; see *Morley v. Attenborough* (1849) 3 Exch.

500.

(*d*) Act of 1893, s. 13 ; *Nichol v. Godts* (1854) 10 Exch. 191 ; *Wallis v. Pratt* [1911] A. C. 394.

the goods are required, so as to show that he relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is also an implied *condition* that the goods shall be reasonably fit for such purpose ; except that, in a contract for the sale of a specified article under its patent or trade name, there is no implied condition as to its fitness for any particular purpose (*a*).

(iii) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied *condition* that the goods shall be of merchantable quality ; except that, if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed (*b*).

(iv) Upon a contract for the sale of goods by sample, there are the following implied *conditions* :—

- (a) that the bulk shall correspond with the sample in quality ;
- (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample ;
- (c) that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on a reasonable examination of the sample (*c*).

Except in the above cases, there is no implied condition or warranty as to quality or fitness ; the maxim in other cases being, *caveat emptor* (*d*).

(a) Act of 1893, s. 14 (1) ; *Wren v. Holt* [1903] 1 K. B. 610 ; *Jackson v. Rotax, &c. Co.* [1910] 2 K. B. 937.  
*Drummond v. Van Ingen* (1887) L. R. 12 App. Ca. 284 ;  
*Preist v. Last* [1903] 2 K. B. 148 ; *Bristol Tramways Co. v. Fiat Motors* [1910] 2 K. B. 138.  
 (c) Act of 1893, s. 15 (2).  
 (d) Act of 1893, s. 14 ; *Ormrod v. Huth* (1846) 14 M. & W. 664.

(b) Act of 1893, s. 14 (2) ;



Of course, there may in all cases be, as we have said above, if the parties so choose, an *express* warranty or condition, either as to title or as to the soundness or other quality of the articles. And the use of the word 'warrant' is not in any case essential. For a mere representation may amount to a warranty, if a warranty was thereby intended; which intention will be a question for the jury, provided that the Court thinks there is sufficient evidence of such intention (a).

Whether an express stipulation in a contract of sale is a *condition*, the breach of which may give rise to a right to treat the contract as repudiated, or a *warranty*, the breach of which merely gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract (b).

Apart from any express or implied warranty, a vendor of goods will be liable for fraud if, knowing goods to be faulty, he represents them to be sound, or uses any art to disguise them (c). Further, a vendor who knows, or has reason to believe, goods sold by him to be dangerous, and fails to warn the purchaser of the danger, or who so carelessly manufactures goods sold by him as to render them dangerous, will be liable for his negligence to a purchaser who suffers damage by using them; and even to a person, not being a purchaser, for whose use he knows the goods to be purchased (d).

(a) *Hopkins v. Tanqueray* (1855) 15 C. B. 130; *Schawel v. Reade* [1913] 2 I. R. 64; *Heilbut v. Buckleton* [1913] A. C. 30.

(b) Act of 1893, s. 11.

(c) *Southerne v. Howe* (1619) 2 Rolle Rep. 5, 26; *Langridge*

*v. Levy* (1837) 2 M. & W. 519.

(d) *George v. Skivington* (1869) L. R. 5 Ex. 1; *Clarke v. Army and Navy Co-operative Society* [1903] 1 K. B. 155. But see *Bates v. Batey* [1913] 3 K. B. 351.

## CHAPTER V.—SECTION IV.

## THE CONTRACT OF BAILMENT.

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*Definition and meaning.*—Bailment (from the French *bailler*, to deliver) is a delivery of goods for some purpose, upon a contract, express or implied, that, after the purpose has been fulfilled, the goods shall be re-delivered to the bailor, or be otherwise dealt with according to his directions, and in the meantime be kept till he reclaims them. [Thus, if cloth be delivered to a tailor, to make a suit of clothes, he has the cloth upon an implied contract to render it again when made. If moneys or goods be delivered to a common carrier, to convey them from Oxford to London, he is under a contract to carry them to the place appointed (a). If goods be delivered to an innkeeper, he is bound to keep them safely, and to restore them when his guest leaves the house. If a man take in a horse, ox, or other cattle to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them, on demand, to the owner (b). And if a debtor bail goods to his creditor by way of pledge or *pawn*, the pawnee has them on the condition of restoring them on the debt being discharged ; and a pawnbroker who receives plate or jewels as security for the repayment of money lent, has them upon a contract or condition to restore them if the borrower redeem them in due time—which he may do at any time while the goods still remain in the

(a) *Black v. Baxendale*  
(1847) 1 Exch. 410.

(b) *Corbett v. Packington*  
(1827) 6 B. & C. 268.

[hands of the pawnbroker unsold (a). Again, if one should deliver anything to his friend to keep for him, the friend is bound to restore it on demand, this being (in Roman law) the contract of *depositum*.] And if you lend any chattel (e.g., your reading-desk) to your friend, although for your friend's use in the meantime, he is bound to return it when the period of the loan is expired; this being the contract of *commodatum*. These two contracts, namely, *depositum* and *commodatum*, were, by the Roman law, both of them gratuitous; that is to say, without fee or reward. But in our law a deposit for custody may well be made for reward (as in the case of goods warehoused); and we should not naturally class such a transaction as a form of *locatio*, as the Romans did. So, if a chattel be let out on hire for a stipulated time, or for a particular service, the hirer is under an obligation to restore it when the time is run out, or the service performed; this being (according to the Roman law) the contract of *locatio rei*, which is always for payment. The Roman lawyers also recognised a *locatio operarum*, which is in fact simply a contract for services to be rendered; and a *locatio operis faciendi*, which is merely a contract for the construction of some building, or doing some other piece of work, of which the tailor's contract above mentioned would be an example.

*Duties of bailee.*—A bailee is liable for the loss of or damage to the thing bailed if caused by his negligence—that is, by his omission to take proper care of it; but the degree of care required will vary according to the circumstances of the case. In *Coggs v. Bernard* (b) it was said, that upon a bailment which is for the

(a) *Walter v. Smith* (1822) 5 B. & Ald. 439. *Ultzen v. Nicols* [1894] 1 Q. B. 92. But see *Wilson v.*

(b) (1704) 2 Ld. Raym. 909; *Giblin v. McMullen* (1868) L. R. 2 P. C. 317; *Brett* (1845) 11 M. & W. 113; and *Harris v. Perry & Co.* [1903] 2 K. B. 219.

mutual benefit of bailor and bailee, the latter is liable for ordinary negligence, viz., for the omission of that degree of diligence which a man of common prudence takes of his own concerns ; that upon a bailment from which the bailee derives no benefit, nothing short of *gross* negligence will make him responsible ; and that, upon a bailment for the bailee's own exclusive benefit, he will be chargeable even for *slight* negligence. But these distinctions, founded upon the Roman law as then understood, have not been strictly followed in our courts. Even a bailee who receives no reward will be liable for failure to take such care as a reasonably prudent owner would take of his own property (*a*), and to use the skill which he professes to have (*b*) ; nor, if he is in fact guilty of negligence, will it be any defence, that he was no less careful of the thing bailed to him than of his own property (*c*). But in no case is an ordinary bailee, without some negligence on the part of himself or of his servants, liable for a robbery or other casualty (*d*).

*Duties of the bailor.*—A bailor is under some duty to his bailee ; for example, if the bailment is of a chattel to be used by the bailee for some particular purpose, or dealt with in a particular way, the bailor will be liable for an injury suffered by the bailee in so using or dealing with such chattel, if it results from a defect in the chattel known to the bailor, and not communicated by him to the bailee (*e*). Moreover, a bailor who derives a benefit from the contract, will be liable

(*a*) *Bullen v. Swan Electric Co.* (1906) 22 T. L. R. 275 ; *Wiehe v. Dennis* (1913) 29 T. L. R. 251.

(*b*) *Wilson v. Brett*, *ubi sup.*

(*c*) *Doorman v. Jenkins* (1835) 2 A. & E. 256.

(*d*) *Williams v. Lloyd* (1628) W. Jones, 179, and Palmer,

548 ; *Sanderson v. Collins* [1904] 1 K. B. 628. For the special liabilities of inn-keepers and carriers, see *post*, pp. 177–183.

(*e*) *Blakemore v. B. & E. Rail. Co.* (1858) 8 E. & B. 1035 ; *Coughlin v. Gillison* [1899] 1 Q. B. 145 ; cf. *Bam-*

for damage caused to the bailee by any defect which is due to the bailor's negligence, or which might have been discovered by him by the exercise of proper care (a). The bailor may be liable for damage caused by his negligence even to one who was not a party to the contract of bailment (b).

It is of the essence of a bailment, that possession is transferred to the bailee; and he is, therefore, as possessor, entitled (as well as in some cases the bailor) to maintain an action against such as injure or take away the chattel (c). And this is so, even in cases where the bailee is not responsible to the bailor for loss of or damage to the goods while in his custody. This right of action has often been explained on the ground that a 'special' or 'qualified' property is transferred along with the possession to the bailee; but, in reality, the right of the possessor to sue is at least as old as that of the owner (d).

Bailees have also, in certain instances, a right of lien, in respect of the goods committed to their charge; the rule of law being, that every person to whom a chattel has been delivered for the purpose of bestowing his labour upon it, has a lien thereon, and may withhold such chattel from the owner (in the absence at least of any usage or special agreement to the contrary) until the price of that labour is paid. For example, a tailor is not bound to deliver up the clothes which he has made, except upon receiving the price which is justly due for the making (e); and he has a

*field v. Goole Transport Co.*  
[1910] 2 K. B. 94.

(a) *Brass v. Maitland*  
(1856) 6 E. & B. 470; *Farrant*  
*v. Barnes* (1862) 31 L. J.  
C. P. 137; *Bamfield v. Goole*  
*Transport Co.*, *ubi sup.*

(b) *White v. Steadman*  
[1913] 3 K. B. 340. (But see

*Bates v. Batey, ibid.*)

(c) *The Winkfield* [1902]  
P. 42.

(d) Bracton, 150 b, 151;  
2 Pollock and Maitland, *His-*  
*tory of English Law*, vol. ii.  
pp. 169, 170.

(e) *Chapman v. Allen* (1632)  
Cro. Car. 272.

lien on them (called a *particular lien*) for the price. The law also recognises a *general lien*, *i.e.*, a lien which entitles the bailee, in some few cases or in special circumstances, to detain a chattel from its owner until payment be made, not only of the expenses incurred on that particular article, but of any balance that may be due to the bailee on a general account between the bailor and himself. These general liens depend entirely upon the contract between the parties, whether such contract is express, or is only implied from the usage of the particular trade, or from the previous course of dealings. But this usage (it has been expressly decided) exists in the case of solicitors, bankers, auctioneers, factors, packers, and warehousemen. All such bailees have consequently a lien for the amount of the general balance due to them from their customers.

We must now consider more particularly two classes of bailees, namely, *innkeepers* and *carriers*.

*Innkeepers as bailees.*—A COMMON INNKEEPER—which term includes in law the keeper of every tavern or house of public entertainment in which lodging for travellers is provided (but not a boarding-house keeper (*a*), nor a lodging-house keeper) (*b*),—is held responsible by the common law for the goods and chattels brought by any traveller to his inn, in the capacity of guest there, in every case where they are either lost, damaged, or stolen (*c*); and it is immaterial that the cost of accommodation and refreshment is to be paid by some third person (*d*). To this rule

(*a*) *Dansey v. Richardson* (1854) 3 E. & B. 144. Of course, a boarding-house keeper is responsible for want of reasonable care (*Scarborough v. Cosgrove* [1905] 2 K. B. 805).

(*b*) *Holder v. Soulby* (1860) 8 C. B. (N.S.) 254.

(*c*) *Calye's Case* (1584) 8 Rep. 32.

(*d*) *Wright v. Anderton* [1909] 1 K. B. 209.

there was no exception permitted by the common law, except where it would have been obviously unjust to apply the rule; as, for example, where the goods were lost entirely through the guest's own gross negligence (*a*), or where they were stolen from his own person, or by his own servant, or from a room which he occupied otherwise than as a guest (*b*). However, by the Innkeepers' Liability Act, 1863, no innkeeper is now liable to make good to a guest any loss or injury to goods or property brought to his inn (not being a horse or other live animal or any gear appertaining thereto, or any carriage—the liability as to which remains as at common law), to a greater amount than thirty pounds; unless the goods have been stolen, lost, or injured through the wilful act, or the default or neglect, of the innkeeper or his servant, or unless they have been deposited expressly for safe custody with the landlord (*c*). To entitle the innkeeper to the benefit of the Act, it is required of him, that a copy of this provision shall be conspicuously exhibited in the hall or entrance to his inn (*d*).

A common innkeeper has no option as to the customer with whom he will deal; being legally bound to receive and entertain every traveller who presents himself for that purpose, and who is ready to pay his expenses, provided only there be sufficient room in the inn (*e*), and no impropriety of conduct, or undue prolongation of stay, on the part of the traveller himself (*f*). An innkeeper is not entitled to detain the person of his

(*a*) *Calye's Case*, *ubi sup.*; *Medawar v. Grand Hotel Co.* [1891] 2 Q. B. 11.

(*b*) *Richmond v. Smith* (1828) 8 B. & C. 11; *Lamond v. Richard* [1897] 1 Q. B. 451.

(*c*) *Whitehouse v. Pickett* [1908] A. C. 357.

(*d*) Act of 1863, s. 3; *Spice v. Bacon* (1877) 2 Ex. D. 463; *Medawar v. Grand Hotel Co.*, *ubi sup.*

(*e*) *The Queen v. Rymer* (1877) 2 Q. B. D. 136; *Browne v. Brandt* [1902] 1 K. B. 696.

(*f*) *Lamond v. Richard* [1897] 1 Q. B. 541.

guest, or to strip off his clothes, in order to secure the payment of the charges which have been incurred ; but he has a lien on any goods brought by the defaulting guest into or upon the premises, including goods to which the guest has no title (*a*). By the Innkeepers Act, 1878, an innkeeper is empowered, by way of realising his lien, to sell by public auction (after an interval of six weeks, and having first given due notice to the owner) any goods, chattels, carriages, horses, wares, or merchandise deposited or left with him on his premises ; in cases where the party depositing or leaving the same has become indebted to him for board or lodging, or for the keep of a horse or other animal left at livery. But any surplus of the sale-proceeds is to be paid over to the owner.

*Common carriers as bailees.*—A COMMON CARRIER is one who professes to carry from one place to another such goods as shall be delivered to him for carriage by any person (*b*). He is looked upon by the common law as an insurer of the goods delivered to him to be carried ; that is to say, he is answerable for every loss of or injury to such goods, not occasioned by the act of God or the King's enemies (*c*). He is moreover bound to receive, and without unreasonable delay to forward to their destination (being within the limits of his accustomed journeys), such goods of every applicant who is ready to pay the price of carriage ; provided he has room for them in his con-

(*a*) *Gordon v. Silber* (1890) 25 Q. B. D. 491 ; *Robins v. Gray* [1895] 2 Q. B. 501. *Quære* whether the innkeeper's lien extends to money lent by the innkeeper to the guest (*Proctor v. Nicholson* (1835) 7 C. & P. 67 ; *Matsuda v.*

*Waldorf Hotel Co.* (1910) 27 T. L. R. 153).

(*b*) *Dickson v. G. N. Railway* (1886) 18 Q. B. D. 176.

(*c*) Co. Litt. 89 ; *Coggs v. Bernard* (1704) 2 Ld. Raym. 918 ; *Nugent v. Smith* (1876) 1 C. P. D. 423.



veyance (a). But to this liability of carriers, an exception was permitted in the case of any material negligence, in the way of packing or otherwise, on the part of the owner of the goods (b); as well as in the case of loss caused by the 'proper vice' of the thing carried, e.g., the deterioration of perishable goods, or the escape of an animal in consequence of its own violent struggles (c). The liability may also (with certain exceptions) be varied by a special contract between the parties relative to the terms on which any particular goods are to be carried (d); and it was formerly competent also to the carrier, by a public notice of the terms on which he would deal (as by a notice that he would not be liable for goods beyond a certain value, unless booked as such, and paid for at a higher rate), to limit to a certain extent the measure of his liability. For upon proof, direct or presumptive (e), that such notice had come to the knowledge of the customer before the goods were sent, the law implied a special contract between the parties conformable to the terms of the notice. But the risk of abuse to which this practice was open has caused certain statutory provisions to be made regarding it, which provisions are of considerable importance.

First, as to CARRIERS BY LAND.—The Carriers Act, 1830, has provided, that no public notice shall limit

(a) *Pickford v. Grand Junction Railway Company* (1844) 12 M. & W. 766.

(b) *Robinson v. Dunmore* (1800) 2 Bos. & P. 419.

(c) *Blower v. G. W. Railway Co.* (1872) L. R. 7 C. P. 655; *Lister v. Lanes. & Yorks. Ry. Co.* [1903] 1 K. B. 878.

(d) As to exemption by contract from liability for negligence, see *Price & Co. v. Union Lighterage Co.* [1904].

1 K. B. 412; *James Nelson & Sons, Ltd. v. Nelson Line* [1907] 1 K. B. 769; [1908] A. C. 16.

(e) *Walker v. York Railway* (1853) 2 E. & B. 750. Cf. *Henderson v. Stevenson* (1875) L. R. 2 H. L. Sc. 470; *Parker v. S. E. R. Co.* (1877) 2 C. P. D. 416; *Richardson v. Rowntree* [1894] A. C. 217; *Marriott v. Yeoward* [1909] 2 K. B. 987.

or in anywise affect the carrier's liability as existing at common law, for any goods in respect whereof he is not entitled to protection under the Act. But it proceeds to enact, that no carrier by land shall be liable for any loss of or injury to gold or silver coin, jewellery, lace (not including machine-made lace) (a), engravings, and a variety of other articles specified in the Act, when the aggregate value of the parcel delivered for carriage shall exceed ten pounds; unless at the time of delivery the value and nature of the contents shall have been declared, and such increased freight paid thereon, as by a legible notice affixed in the office of the carrier shall have been previously advertised to the public as the scale by which such articles will be charged for. If no such notice shall have been affixed, or increased charge demanded on the value being declared (b), or if the carrier refuses (on being paid the increased charge) to give a receipt acknowledging the parcel to be insured, or if loss or injury arises from the *felonious* act of a servant in the carrier's employ (c), then he is not entitled to the benefit of the statute, but remains liable as at common law. The Act contains also a proviso (d), that nothing contained therein shall affect any special (*i.e.*, express) contract between the carrier and the customer, or shall protect any servant of the carrier from liability or loss occasioned by his own personal neglect or misconduct; but such special contract cannot, of course, be set up by the carrier merely by public notice or declaration.

The liability of railway, canal, and navigation companies, in respect of the carriage of goods by land, is the same as that of other carriers; except so far

(a) 28 & 29 Vict. (1865) c. 94. *well v. Cheshire Lines* [1907] 2 K. B. 499).

(b) *Great Northern Railway Company v. Behrens* (1862) 7 H. & N. 950. The Act applies to passengers' luggage (*Cass-*

(c) *Stephens v. London and South Western Railway* (1886) 18 Q. B. D. 121.

(d) S. 6.

as varied by certain statutes, and in particular the Railway and Canal Traffic Acts, 1854 to 1913, and the Regulation of Railways Acts, 1840 to 1893. The general effect of these Acts may (so far as this question of liability is concerned) be stated as being to prevent such companies, regarded as common carriers, from entering into special contracts limiting their common law liability with respect to the receipt, forwarding, and delivery of goods, unless the conditions of the special contract are reasonable (*a*), and the contract is a written contract, signed by or on behalf of the consignor (*b*). The reasonableness of the conditions is determined by the judge, before whom the action comes to be tried, in which the special contract is raised as a defence by the company (*c*). But, of course, as regards passengers' luggage, the contract of carriage being for the carriage of the passenger himself as well, if he interfere with the luggage, he may himself be taken to have contributed to the loss of it; and when, *e.g.*, he takes it into the carriage with him, he may reasonably be deemed to have assumed the entire custody of it. In such cases, the liability of the carrying company is very difficult to determine; being dependent on the particular facts in each case (*d*). There are also, as regards the carriage of such substances as petroleum and dangerous explosives generally, specific

(*a*) *Shaw v. Great Western Railway* [1894] 1 Q. B. 373; *Wilkinson v. Lancs. & Yorks. Ry. Co.* [1906] 2 K. B. 619; *Jenkins v. Great Central Railway* [1912] 1 K. B. 1; *Western Electric Co. v. Great Eastern Railway Co.* [1913] 3 K. B. 15.

(*b*) *Wilkinson v. Lancs. & Yorks. Ry. Co.* [1907] 2 K. B. 222; Railway and Canal Traffic Act, 1854, s. 2.

(*c*) *Peck v. The North Staffordshire Railway* (1863) 10 H. L. C. 473; *Great Western Railway Company v. McCarthy* (1887) L. R. 12 App. Ca. 218.

(*d*) *Bergheim v. G. E. Rail. Co.* (1873) 3 C. P. D. 221; *G. W. Rail. Co. v. Bunch* (1888) L. R. 13 App. Ca. 31; *Meux v. G. E. Railway* [1895] 2 Q. B. 387.

statutory provisions which it does not fall within the scope of this discussion to refer to.

Second, with regard to CARRIERS BY SEA.—It is to be observed, that the liability of a shipowner, though he is in contemplation of law a common carrier, if the ship be ordinarily hired to carry goods, does not usually rest on the common law rule, but on a special contract created between the parties, by the bill of lading or charterparty which usually attends a shipment of goods. Such contract is commonly framed so as to exempt the carrier by sea from loss or injury occasioned by the act of God, or of the King's enemies, or by the perils of the sea. The Merchant Shipping Act, 1894, moreover, provides, that no owner (*a*) of any British sea-going ship, or of any share therein, shall be liable to make good any loss or damage, occurring without his own actual fault or privity, to goods or things on board, by reason of fire breaking out on board; or to any gold, silver, diamonds, watches, jewels, or precious stones, occasioned by robbery or embezzlement, unless the true nature and value of such articles shall have been declared in writing to the master or owner. By a further provision of the Act of 1894 (*b*), as amended by the Merchant Shipping Act, 1906 (*c*), it is further enacted that, in respect of any loss or damage to goods which occurs without his own actual fault or privity, no shipowner shall be answerable to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage.

<p>(<i>a</i>) S. 502. The term 'owner,' by virtue of the Merchant Shipping Act, 1906, s. 71, is deemed to include</p>	<p>any charterer to whom the ship is demised. (<i>b</i>) S. 503. (<i>c</i>) S. 69.</p>
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## CHAPTER V.—SECTION V.

## THE CONTRACT OF LOAN.

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THE contract for the loan of money (which was called *mutuum* by the civilians, in order to distinguish it from the *commodatum* already spoken of) differs from the ordinary contract of bailment, inasmuch as the money which forms its subject is not to be re-delivered to the lender,\* or disposed of according to his direction, but is to be applied to the use and according to the wishes or the necessities of the borrower ; the borrower yielding afterwards to the lender an equal sum by way of repayment. In addition to which repayment, there is commonly yielded an increase, by way of compensation for the use of the sum advanced ; which increase is called *interest*. In former times, it was considered by many good and learned men, that all increase of money by way of interest was against conscience, for that it was forbidden by the law of Moses ; but the objection has been at all times little regarded, and perhaps has been the least regarded of all people by the very people to whom the law of Moses is an object of the supremest regard. [And the practice of taking interest on loans has in modern times been sanctioned by all legislators ; though there has often prevailed a desire to restrict by positive enactment the exorbitancy of the interest which might be lawfully taken. For example, the Romans, whose law of the Twelve Tables prescribed *fœnus unciarium* (or about 8 per cent. per annum), afterwards allowed *centesimæ*, that is to say, 12 per cent. per

[annum ; but Justinian reduced the general rate to 4 per cent., allowing higher interest (rising even to 12 per cent.) to be taken where the hazard was greater (a). And Lord Bacon was desirous of introducing a similar policy into England (b), where in general the amount of interest was limited ; all interest beyond the legal limit being prohibited as *usury*.] The legal rate, which, in the time of Henry the Eighth, was fixed at 10 per cent., was reduced by successive enactments ; until, in the reign of Anne, it was fixed at 5 per cent. And this continued to be the legal rate until the repeal of the laws against usury.

There were, however, even when the policy of limiting the rate was in force, certain cases in which the legal rate of interest was subject to no restriction whatever. Thus, when the contract was made in a foreign country, the interest was payable according to the law of the country in which the contract was made (c) ; and when the right to recover the money lent was, by the terms of the loan, put in jeopardy, this latter species of hazard, being a very different matter from the ordinary risk of insolvency, was esteemed a sufficient consideration for allowing a rate of interest higher than the legal rate.

The peculiar hazard referred to occurred in the case of *bottomry* (or *respondentia*) bonds, and in the case of *annuities upon lives* ; and these two peculiar species of loan, it will be convenient to consider here more at large.

[**BOTTOMRY.** This species of loan is when the owner of a ship takes up money on it to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship (*partem pro toto*) as a security for the repay-

(a) Cod. 4, 32, 36 ; Nov. 33, 34, 35.

(b) *Essays*, ch. 41.

(c) *Ekins v. E. I. Co.* (1717) 2 Eq. Ca. Ab. 533.

[ment (a). The hypothecation may include the freight and cargo as well as the ship itself (b). This pledge may be given, and a valid contract of bottomry entered into, also by the master of the vessel, in a case of absolute necessity, and to the extent only of the necessity (c). It is one of the terms of this contract of bottomry, that, if the ship be lost, the lender loses also his whole money; but that, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon. Which premium or interest, though very high, has always been allowed, by reason of the extraordinary hazard run by the lender (d).

A *respondentia* bond differs from a bottomry bond properly so called, in that the former extends not to the ship and tackle, but only to the goods and merchandise; and as these are generally sold in the course of the voyage, the borrower only is personally bound to answer it.

Contracts of an analogous character are also sometimes effected on the mere hazard of the voyage itself, as when a man lends a merchant a sum to be employed upon a voyage, upon the condition of being repaid with extraordinary interest, in case the voyage be safely performed; the interest or recompense which is payable to the lender on this kind of agreement being formerly called sometimes *fœnus nauticum*, and sometimes *usura maritima* (e). But, since the repeal of the usury laws, the distinction as to interest is, of course, immaterial.

ANNUITIES FOR LIVES. These are contracts in which the borrower of money, being unable to give the

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|--|---------------------------------------|
| (a) <i>The Atlas</i> (1827) 2                    | P. D. 177.                            |
| Hagg. Adm. 53.                                   | (d) <i>The Atlas, ubi sup.</i> ;      |
| (b) <i>The Nelson</i> (1825) 1                   | <i>The Great Pacific</i> (1869) L. R. |
| Hagg. Adm. 169; <i>The Chioggia</i> [1898] P. 1. | 2 P. C. 516.                          |
| (c) <i>The Pontida</i> (1884) 9                  | (e) Malynes, <i>Lex Mercat.</i>       |
|  | bk. i. ch. xxxi.                      |

[lender any tangible security for the return of the money at any given period of time, undertakes or promises to repay annually, during his life, some part of the money borrowed, together with interest for so much of the principal as annually remains unpaid ; rendering also some additional compensation for the hazard run by the lender of losing the whole or a portion of the principal by the borrower's death. The right to recover the principal being thus in jeopardy, a transaction of this kind was never looked upon as an usurious bargain ; not even when the life of the borrower was insured for the benefit of the lender, and the amount of the annuity was adjusted to cover the expense of the insurance, or when the borrower himself insured his own life, at his own expense, for the benefit of the lender (a).]

When these annuities are granted in such manner as to be charged upon lands, then, in order that it may be ascertained by subsequent purchasers and mortgagees of the lands what life annuities have been charged thereon, they are required to be registered. For, by the Judgments Act, 1855 (b), no annuity or rentcharge granted after the passing of the Act, otherwise than by marriage settlement or by will, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, will affect any lands, tenements, or hereditaments, as against purchasers, mortgagees, or creditors, without notice (c), until a memorandum, containing the name and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is affected thereby, and the date of the instrument whereby the annuity or rentcharge is granted, and the amount of the annual sum

(a) *Downes v. Green* (1844) 12.

12 M. & W. 481.

(c) *Greaves v. Tofield* (1880)

(b) 18 & 19 Vict. c. 15, s. 14 Ch. D. 563.



to be paid, has been duly registered. The register of such annuities was formerly kept in the Court of Common Pleas, later in the Central Office of the Supreme Court; now it is in the Land Registry (a). The particulars aforesaid are entered in alphabetical order, in the name of the person whose estate is affected by the annuity or rentcharge.

The laws against usury being found, however, to impose inconvenient restraints upon the price of money, and being believed at the same time not to afford any real protection to improvident borrowers, it was enacted by the Usury Laws Repeal Act, 1854, that all the existing laws against usury should be repealed. But the repeal of the usury laws has in no way interfered with the right to be relieved, on equitable grounds, against exorbitant or iniquitous bargains (b); and recently the legislature has to some extent reverted to the policy of the earlier statutes by enacting the Moneylenders Acts, 1900 and 1911. Under these Acts, the Court may, even in cases not falling within the principles upon which a court of equity would have given relief, reopen and relieve against 'harsh and unconscionable' transactions, in which the Court is satisfied that the interest or other charges are excessive. The relief given is usually upon the footing of ordering the debtor to repay only the amount actually advanced, together with interest at the rate of ten or, in some cases, twenty per cent, or even more (c). Moreover, the Act of 1900 (d)

(a) Land Charges Act, 1900.

(b) *Brenchley v. Higgins* (1901) 83 L. T. 751.

(c) Moneylenders Act, 1900, s. 1; *Re a Debtor* [1903] 1 K. B. 705; *Carrington v. Smith* [1906] 1 K. B. 79; *Bonnard v. Dott* [1906] 1 Ch. 740; *Samuel v. Newbold*

[1906] A. C. 461. But a transaction is not necessarily 'harsh and unconscionable' merely because the interest and charges are high (*Carringtons v. Smith* [1906] 1 K. B. 79; *Fieldings v. Pawson* [1907] W. N. 231).

(d) S. 2.

requires every moneylender, under penalties, to register himself in accordance with its provisions ; and a moneylender cannot make any valid agreement in the course of his business as a moneylender with respect to the advance and repayment of money, or take any security for money in the course of such business, otherwise than in his registered name. The amending Act of 1911, however, provides that agreements with, and securities taken by, a moneylender, and payments made on the faith of such agreements or securities, shall, in favour of a *bonâ fide* assignee or person paying without notice of a defect due to the operation of this provision of the Act of 1900, be deemed to be valid, but that the moneylender shall be liable to indemnify the borrower or other person who is prejudiced by virtue of the amending enactment. A person who is himself a moneylender cannot, however, rely upon this enactment, if he deals in securities in fact given to an unregistered moneylender (a).

The Acts apply only to transactions with *moneylenders*, i.e., persons whose business is that of money-lending, or who hold themselves out in any way as carrying on that business ; and not to a transaction with a person who *bonâ fide* carries on some other business, although he may lend money in the course of it (b). No person can be registered as a moneylender under any name including the word 'bank,' or under any name implying that he carries

(a) Moneylenders Act, 1900, s. 2 ; *Victorian Daylesford Syndicate v. Dott* [1905] 2 Ch. 624 ; *Bonnard v. Dott* [1906] 1 Ch. 740 ; *Re Campbell* [1911] 2 K. B. 992 ; *Gant v. Hobbs* [1912] 1 Ch. 717. It may be however that the borrower cannot recover property which he has mort-

gaged without repaying the money actually lent (*Lodge v. National Union Investment Co.* [1907] 1 Ch. 300 ; but see *Chapman v. Michaelson* [1909] 1 Ch. 238).

(b) Act of 1900, s. 6 ; *Litchfield v. Dreyfus* [1906] 1 K. B. 584.

on banking business ; and a moneylender renders himself liable to penalties, if, in the course of carrying on the moneylending business, he issues any circular or statement containing expressions which might reasonably be held to imply that he carries on banking business (*a*). It is not lawful for a moneylender to register himself in more than one name ; if through error he has been permitted to register himself under two or more names, contracts made in either registered name are valid (*b*), but the moneylender incurs penalties for so carrying on business in more than one name (*c*).

Interest may accrue not only upon a contract of loan, but in other cases also, *e.g.*, on a balance admitted to be due. For although the general rule of the common law was against *implying* any contract for the payment of interest on money due, yet to this rule there were certain exceptions. First, in the case of overdue bonds, bills, and notes ; second, where there was a special usage of trade for the allowance of interest ; third, where the same parties had, in former accounts of the same description, claimed interest on the one side, and allowed it on the other (*d*). And it has now been provided generally, by the Civil Procedure Act, 1833 (*e*), that “upon all debts or “sums certain, payable at a certain time, or otherwise,” the jury may “allow interest to the creditor “at a rate not exceeding the current rate of interest ; “and when such debts or sums certain are payable “by virtue of some written instrument at a time “certain, from that time ; and when payable otherwise, “then from the time when demand of payment shall

(*a*) Act of 1911, s. 2.

(*b*) *Whiteman v. Sadler*  
[1910] A. C. 514.

(*c*) *Whiteman v. Director of  
Public Prosecutions* [1911] 1

K. B. 824.

(*d*) *Re Marquis of Anglesey*  
[1901] 2 Ch. 548.

(*e*) S. 28.

“have been made in writing, so as such demand shall  
 “give notice to the debtor, that interest will be  
 “claimed from the date of such demand, until the  
 “time of payment.” And by the same Act it is  
 further provided, that the jury may give damages in  
 the nature of interest, in actions for the wrongful  
 seizure or conversion of goods, and in actions on  
 policies of insurance; and that where proceedings  
 in error (or, now, on appeal) are taken by the defendant  
 in an action, and judgment is given for the original  
 plaintiff, interest shall be allowed him for the delay  
 thereby occasioned (a). By the Judgments Act,  
 1838 (b), every judgment debt now carries interest,  
 at the rate of four per cent., from the time of entering  
 up the judgment, until the satisfaction thereof; and  
 such interest may be levied, along with the principal,  
 under a writ of execution. Also, interest on the costs  
 of an action is allowed, as from the date of the  
 judgment or order; and this rule applies even to an  
 interlocutory order (c).

(a) See generally on the Act,  
*Re Lloyd Edwards* (1891) 61  
 L. J. Ch. 22; *Re Horner*  
 [1896] 2 Ch. 188; *L. C. & D.*  
*Ry. v. S. E. Ry.* [1892] 1 Ch.  
 120; [1893] A. C. 429;  
*Alexandra Docks Co. v. Taff*

*Vale Ry. Co.* (1911) 28 T. L.  
 R. 163.

(b) S. 7.

(c) Judgments Act, 1838,  
 s. 18; O. xlii. r. 16; *Taylor*  
*v. Roe* [1894] 1 Ch. 413.

## CHAPTER V.—SECTION VI.

## THE CONTRACT OF PARTNERSHIP.

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THE contract of partnership arises where two or more persons carry on any business together, upon the terms of mutual participation in its profits and losses ; and this, whether they are to participate in equal shares or in any other proportions. The Partnership Act, 1890, which has now codified the law on the subject, defines a partnership as “ the relation which subsists between “ persons carrying on a business in common with a view “ of profit,” otherwise than as companies registered under the Companies (Consolidation) Act, 1908, or otherwise incorporated, or as companies (called Cost Book Mining Companies) engaged in working mines within the Stannaries of Cornwall and Devon (a). The number of persons who may be so associated together must not exceed twenty in ordinary cases, or ten in the case of a banking business ; for otherwise, the association will be illegal, unless it be registered as a company (b). A partnership is usually constituted by a written agreement, commonly by deed, the provisions of the deed being denominated the ‘ articles ‘ of partnership ’ ; but a partnership may also be constituted without any writing, and may even be implied from the conduct of the parties. The partners constitute what in law is called a ‘ firm ’ ; and they trade under the ‘ firm name ’ (c). But the firm, unlike

(a) S. 1 ; *Dunbar v. Harvey*      tion) Act, 1908, s. 1.  
 [1913] 2 Ch. 530.      (c) Partnership Act, 1890,  
 (b) Companies (Consolida-      s. 4.

a company or corporate body, is not a 'person' of itself; and the individual partners do not lose their individuality therein. Partners may, however, by the Rules of the Supreme Court, now sue and be sued in their firm name (a).

A partnership may be dissolved, if the period of its proposed duration be indefinite, at the pleasure of any partner; unless it has been agreed that it shall be terminated by mutual arrangement only (b). Or if, as is more frequent, the partnership be for a term certain, it may be dissolved, either by the natural expiration of that term, or, at an earlier period, by the mutual agreement of the parties, or by a decree of the Court, if there are proper grounds for such decree. Such grounds are specified in the Partnership Act (c). Moreover, the death or bankruptcy of any of the partners will, in any case, amount to a dissolution of the partnership, as regards all the partners; unless the partnership articles should provide to the contrary (d). A partnership is also dissolved by the happening of any event which renders its further continuance illegal (e).

One of the most important doctrines attaching to the relation of partnership is, that a contract made, or act done, or instrument executed, by any partner in matters relating to the business of the partnership, is, in point of law, the contract or act of all the partners; consequently, such contract or act is binding upon them all, so as to render each partner liable upon it individually (f). Even the tortious act of one partner will render the others liable, if it was done within the general scope of his authority as a partner (g). This

(a) O. XLVIII., A; *Abrahams v. Dunlop Pneumatic Tyre Co.* [1905] 1 K. B. 46.

(b) Partnership Act, 1890, ss. 26, 32; *Moss v. Elphick* [1910] 1 K. B. 846.

(c) S. 35.

(d) *Ibid.* s. 33.

(e) *Ibid.* s. 34.

(f) *Ibid.* ss. 5, 6.

(g) *Ibid.* ss. 10–12; *Hamlyn v. Houston* [1903] 1 K. B.

rule has been established for the benefit of commerce ; the doctrine being founded on the principle, that the relationship of principal and agent exists between each partner and his co-partners in all matters which fall within the scope of the partnership business, and that by the act of the agent his principal is bound (*a*). This rule holds good, in a general way, even where the act of the individual partner would, as between himself and his co-partners, be contrary to the partnership articles. But the firm is not bound (i) where the partner so acting has in fact no authority to act for the firm, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner (*b*) ; (ii) where a partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, and he is not in fact specially authorised by the other partners (*c*) ; (iii) where it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, and an act is done in contravention of the agreement with respect to persons having notice of the agreement (*d*).

And the implied authority of partners to bind their firm is one which does not extend to matters extraneous to the joint concern, nor to matters which, though connected with it, are, by the ordinary usage of business, transacted with the express and formal intervention of all the partners. For example, it is settled law, that one member of a firm has no implied authority to refer to arbitration a dispute in which the partnership is involved with a stranger (*e*), nor to execute a

81. (But see *British Homes Assurance Corporation v. Paterson* [1902] 2 Ch. 404.)

(*b*) Act of 1890, s. 5.

(*c*) *Ibid.* s. 7.

(*d*) *Ibid.* s. 8.

(*a*) *Fox v. Clifton* (1830) 6 Bing. 795 ; *Cox v. Hickman* (1860) 8 H. L. C. 268.

(*e*) *Stead v. Salt* (1825) 3 Bing. 101.

deed in the name of the partnership (*a*), or to bind the firm by a guarantee (*b*). In these cases, the other members of the firm must either be actual parties to the transaction, or must give their special consent that the one partner should act for them in the matter; and that special consent must be authenticated by deed, where a deed is to be executed in the name of the partnership. As regards accepting bills of exchange or making promissory notes, a partner has implied authority to bind the firm only in the case of a trading partnership. In other cases, in order to make the firm liable upon the bill or note, it must be shown that such a course of dealing is necessary or usual in the particular business (*c*).

A partnership may, as regards strangers or third persons, be an actual partnership, although it purports not to be so as between the partners themselves (*d*). For a man who is not really a partner, may nevertheless allow his credit to be pledged as a partner; as in a case where his name appears in the firm, or where he interferes in the management of the business, or otherwise 'holds himself out' (*i.e.*, represents himself or knowingly suffers himself to be represented) as a partner, so as to produce a reasonable belief in strangers that he is a partner (*e*). In which cases he is answerable as an ostensible partner to any one who, on the faith of such representation, has given credit to the firm; whether the representation has or has not been

(*a*) *Harrison v. Jackson* (1797) 7 T. R. 207; Partnership Act, 1890, s. 6. (But see *Re Briggs* [1906] 2 K. B. 209.)

(*b*) *Brettel v. Williams* (1849) 4 Ex. 623.

(*c*) *Bank of Australasia v. Breillat* (1847) 6 Moo. P. C. at p. 194; *Yates v. Dalton* (1858) 28 L. J. Ex. 69. An

auctioneer is not a trader for this purpose (*Wheatley v. Smithers* [1906] 2 K. B. 321).

(*d*) *Pooley v. Driver* (1876) 5 Ch. D. 458; *Davis v. Davis* [1894] 1 Ch. 393.

(*e*) Partnership Act, 1890, s. 14 (1). And see *Mollwo v. Court of Wards* (1872) L. R. 4 P. C. 435; *Smith v. Bailey* [1891] 2 Q. B. 403).



made or communicated to the person so giving credit by or with the knowledge of the apparent partner. But where, after a partner's death, the partnership business is continued in the old firm name, the continued use of that name, or of the deceased's name as part thereof, does not of itself make his executors or administrators, or his estate or effects, liable for any partnership debts contracted after his death (a).

Conversely, it frequently happens also, that a partnership comprises some member not generally known to be interested in the business or adventure; the firm name not usually containing the names of all the members. A partner thus unknown to the public is a 'dormant' partner; and every person dealing with the firm is entitled, when he discovers the existence of such dormant partner, to hold him chargeable with the others (b).

A man does not become a partner merely from owning property in common with others, or even from participating in the profits of a partnership (c); although the contrary was at one time supposed. Participation in profits is, however, declared by the Partnership Act to be an important element in determining whether or not the parties interested in the common business are partners therein; and is *prima facie* evidence that they are partners (d). But it is expressly provided by that statute (e):—(1) that the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business, does not of itself make him a partner in the business or liable as such; (2) that a contract

(a) Partnership Act, 1890, s. 14 (2).

(b) *Heath v. Sansom* (1832) 4 B. & Ad. 172.

(c) *Cox v. Hickman* (1860) 8 H. L. C. 268; *Davis v. Davis* [1894] 1 Ch. 393;

Partnership Act, 1890, s. 2.

(d) *Ibid.* s. 2 (3).

(e) *Ibid.*; re-enacting (with slight amendments) the provisions of 28 & 29 Vict. (1865) c. 86 (Bovill's Act).

for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business, does not of itself make the servant or agent a partner in the business or liable as such ; (3) that a person, being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not, by reason only of such receipt, a partner in the business, or liable as such ; (4) that the advance of money by way of loan to a person engaged, or about to engage, in any business, on a written contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business (the contract being signed by all parties), does not of itself make the lender a partner with the person or persons carrying on the business or liable as such ; and (5) that a person receiving, by way of annuity or otherwise, a portion of the profits of a business, in consideration of the sale by him of the goodwill of the business, is not, by reason only of such receipt, a partner in the business or liable as such (a). The Act, however, provides, with regard to the fourth and fifth of the last-mentioned cases, that, in the event of the bankruptcy or insolvency of the borrower or purchaser, the lender of money and the vendor of a goodwill can only recover the debt or share of profits contracted for, after all other creditors of the trader for valuable consideration have been satisfied (b).

There is this important difference between an ostensible and a dormant partner ; namely, that an ostensible partner, when he retires, continues liable,

(a) *Pooley v. Driver* (1876) 357.  
 5 Ch. D. 458 ; *Ex parte Delhasse* (1877) 7 Ch. D. 511 ; *Re Hildesheim* [1893] 2 Q. B.  
 (b) S. 3 ; *Re Mason* [1899] 1 Q. B. 810.

on the future engagements of the partnership, to all persons who have before dealt with the firm, and have not received actual notice of the fact of his retirement. And he will be liable even to those who have not before dealt with the firm and have not received actual notice of his retirement, until public notice thereof is given in some sufficient way, as by advertisement in the *London Gazette*. But a dormant partner, when he retires, is not liable on these future engagements at all; either to the former customers of the firm or to the new customers (a).

When a partnership entered into for a fixed term is continued after the full expiration of the term, and there is no new deed of partnership or express new partnership agreement, the rights and duties of the partners remain the same as they were at the expiration of the old term, so far as is consistent with the incidents of a partnership at will (b); except, of course, when the partnership is (as it may be) merely continued with a view to the due winding up thereof. In this case, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue so far only as may be necessary to wind up the affairs of the partnership, and to complete its unfinished transactions (c).

On a dissolution of the partnership, every partner has a right to have the property of the partnership, including the goodwill of the business, applied in payment of the debts and liabilities of the firm, and to have the surplus assets applied in paying to each partner any advances made by him, and his share of capital, and to have any ultimate residue divided

(a) Partnership Act, 1890, 1 Ch. 284.

s. 36; *Carter v. Whalley* (1830) 1 B. & Ad. 11.

(b) Partnership Act, 1890, s. 27; *Daw v. Herring* [1892]

(c) Partnership Act, 1890, ss. 27, 38; *Re Bourne* [1906]

2 Ch. 427.

among the partners in the proportion in which profits are divisible (a). But where the final accounts show that there has been a loss of capital, such loss must first be made good by the partners in the proportions in which they were entitled to share profits; and the assets of the firm, including the sums so contributed to make up loss of capital, will then be applied in paying rateably to each partner what is due to him in respect of capital (b).

Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal personal representatives (c); and, in a transaction between partners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the partner who knows, and is aware that he knows, more about the partnership accounts than the other, to put the latter in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows (d).

By the Limited Partnerships Act, 1907 (e), it is enacted that limited partnerships may be formed, which must, however, be registered with the Registrar of Joint Stock Companies. Such partnerships must consist of one or more *general* partners, who are liable for all debts and obligations of the firm, and of one or more *limited* partners, who are not liable beyond the capital contributed by them on entering the partnership. A limited partner is precluded from taking part in the management of the firm's business, has no power to bind the firm, and is in other respects different

(a) Partnership Act, 1890, ss. 39, 44; *Hill v. Fearis* [1905] 1 Ch. 466.

(b) *Garner v. Murray* [1904] 1 Ch. 57; Partnership Act, 1890, s. 44.

(c) Partnership Act, 1890, s. 28.

(d) *Maddeford v. Austwick* (1826) 1 Sim. 89; *Law v. Law* [1905] 1 Ch. 140.

(e) 7 Edw. 7, c. 24.

from a general partner. But, except as provided by the Act of 1907, a limited partnership is governed by the Partnership Act, 1890, and by the rules of law and equity, in the same manner as an ordinary partnership. It is now wound up in bankruptcy, not under the provisions of the Companies Act (a).

(a) Bankruptcy Act, 1913, s. 24.

## CHAPTER V.—SECTION VII.

## THE CONTRACT OF GUARANTEE (OR OF SURETYSHIP).

*Definition.*—The contract of guarantee (or of suretyship) arises, where one man contracts, on behalf of another, an obligation for which the latter is and remains primarily liable ; *e.g.*, when a sum of money is advanced to A., and B. joins with A. in giving a bond for its repayment ; or where there is an agreement to supply A. with goods to a certain amount on credit, and in consideration thereof B. promises to see the seller paid for all the goods that shall be so supplied ; or where A. is appointed a public officer, and B. joins with him in a bond, engaging that the duties of the office shall be faithfully performed by A. (*a*). The obligation of suretyship or guarantee must be carefully distinguished from two somewhat similar cases, *viz.*, (1) cases in which a person undertakes the primary liability in respect of an obligation contracted for the benefit of a third person (*b*) ; and (2) cases in which one person merely undertakes to indemnify another against some liability or risk (*c*).

*Form.*—Contracts of guarantee will not sustain an action, or be legally enforceable, if made by word of

(*a*) *Duncan & Co. v. N. & S. Wales Bank* (1880) L. R. 6 App. Ca. 11.

(*b*) See *Mountstephen v. Lakeman* (1870) L. R. 5 Q. B. 613.

(*c*) *Sutton v. Grey* [1894] 1 Q. B. 285 ; *Guild v. Conrad* [1894] 2 Q. B. 885 ; *Harburg Co. v. Martin* [1902] 1 K. B. 778 ; *Re Denton's Estate* [1904] 2 Ch. 178.

mouth only; for, by the Statute of Frauds (*a*), no action may be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some other person by him lawfully authorised. The writing must contain all the terms of the contract (*b*); excepting that, by the Mercantile Law Amendment Act, 1856 (*c*), no such promise is now to be invalid to support an action, by reason only that the consideration for the promise does not appear, either in the writing or by necessary inference from the written document. But, of course, whenever such contract is a simple contract, *i.e.*, not under seal, or of record, it must have a consideration in fact (*d*). And here it will be useful to observe, that the provisions of the Statute of Frauds as to guarantees were frequently evaded, and found accordingly to afford an insufficient protection to persons in the position of guarantors; inasmuch as the statute did not prevent an action of *tort*, founded on deceit, from being brought successfully in respect of representations as to the character, conduct, credit, ability, trade, or dealings of a person to whom credit was to be given on the faith thereof (*e*). Wherefore, it was afterwards further enacted by the Statute of Frauds Amendment Act, 1828 (*f*) ('Lord Tenterden's Act'), that no action should be brought whereby to charge any person by reason of any such representation; unless such representation should be in writing and signed by the party to be charged therewith.

(*a*) 29 Car. 2 (1677) c. 3,  
s. 4.

(*b*) *Ante*, pp. 102–103.

(*c*) S. 3.

(*d*) *Crears v. Hunter* (1887)  
19 Q. B. D. 341.

(*e*) *Pasley v. Freeman*  
(1789) 3 T. R. 51.

(*f*) S. 6; *Hirst v. West*  
*Riding Union Banking Co.*  
[1901] 2 K. B. 560.

*Nature of the contract.*—The contract of guarantee or of suretyship is not, in the strict sense, a contract *uberrimæ fidei*, i.e., a contract in the formation of which each party is bound to afford the other the fullest information in his power; but any material misrepresentation to the surety or guarantor will entitle him to avoid his liability (a). But a 'fidelity guarantee' is in the nature of an insurance; and therefore, where an employer, on taking a bond from another, which purported to make the latter responsible as surety for the fidelity of the servant, did not disclose to the surety the fact, which was known to the employer but not to the surety, that the servant had previously been guilty of dishonesty in his employment, the employer could not enforce the bond in respect of the servant's subsequent dishonesty, even though the non-disclosure was not fraudulent (b).

*Discharge of surety.*—A guarantor or surety will be discharged: (1) if the principal debtor be released by the creditor, or if the debt or demand be by any means extinguished as between the two principals. For the surety's obligation, being collateral only, cannot survive the liability of the principal debtor himself (c). He will also be discharged: (2) if the original risk be substantially altered by the principals to the transaction without the surety's consent (d); or (3) if the creditor, before obtaining judgment against the surety (e), and without the surety's permission, gives or

(a) *Lee v. Jones* (1864) 17 A. C. 313; *Re E. W. A.* [1901] C. B. (N.S.) 503; *Seaton v. Heath* [1899] 1 Q. B. 782; *Seaton v. Burnand* [1900] 2 K. B. 642; *Hastings Corporation v. Letton* [1908] 1 K. B. 378.

A. C. 135.  
(d) *Holme v. Brunskill* (1872) 3 Q. B. D. 495. Cf. *National Provincial Bank v. Glanusk* [1913] 3 K. B. 335.

(e) *Commercial Bank of Tasmania v. Jones* [1893] 3 K. B. 11.



agrees to give time to the debtor, unless the contract of suretyship provides the contrary (*a*) ; or (4) by any negligence of the creditor which prejudices the surety (*b*). But the application of all these rules may be, and often is, largely varied or excluded by the contract between the surety and the creditor (*c*). And a guarantee for the payment of the principal and interest of a company's debentures may be in the nature of a contract of insurance as well as a guarantee, and will not in such a case be destroyed by the disappearance of the debt (*d*); nor is a guarantee for the interest of debentures put an end to by the dissolution of the company (*e*).

By the Partnership Act, 1890 (*f*), it is provided, that a continuing guarantee to or of a *firm* is (in the absence of agreement to the contrary) revoked as to future transactions by any change in the constitution of the firm.

*Position of the surety.*—The law moreover implies, in favour of the surety, a promise on the part of the principal debtor to reimburse and indemnify him—as well principal as interest—for any payment which he is obliged to make under the guarantee. And where two or more persons have become sureties in respect of the same debt or demand, whether by the same instrument of guarantee or by different ones, any one of them who pays more than his rateable proportion is entitled, in general, subject to any express agreement excluding or qualifying the right, to obtain contribution for such excess from the other surety (*g*) ; while,

(*a*) *Bolton v. Buckenham* 1 Ch. 464.

[1891] 1 Q. B. 278 ; *Rouse v. Bradford Banking Co.* [1894] Ch. 138.

A. C. 586 ; *Greenwood v. Francis* [1899] 1 Q. B. 312.

(*b*) *Taylor v. Bank of N. S. Wales* (1886) L. R. 11 App. S. 18.

Ca. 603.

(*c*) *Perry v. National Provincial Bank of England* [1910] 1 Q. B. 75.

(*d*) *Shaw v. Royce* [1911] 1 Ch. 138.

(*e*) *Re Fitzgerald* [1905] 1 K. B. 462.

(*f*) S. 18.

(*g*) Mercantile Law Amendment Act, 1856, s. 5 ; *Ellesmere Brewery v. Cooper* [1896] 1 Q. B. 75.

if one of the co-sureties becomes insolvent, the contribution of the others is increased by his share (a). This right of contribution is available for the surety even before payment by him; if a judgment for the amount has been obtained against him (b).

Again, when the principal debt becomes due, the surety may apply to the Court to compel the principal debtor to pay it off, and so to relieve him from any continuing liability (c).

Finally, where the surety is himself obliged to make the payment, he is entitled, under the principle of *subrogation*, to stand in the shoes of the creditor against the principal debtor, and to have an assignment of every security which the creditor holds in respect of the debt, and to stand in the place of the creditor in respect of every such security, whether as against the principal debtor, or as against any co-surety (d). The right of a surety to the benefit of a collateral security is not in abeyance till he is called on to pay, but may be enforced at any time after the principal debt becomes due (e).

(a) *Hitchman v. Stewart Dry Dock Co.* [1909] 2 Ch. 401.  
(1855) 3 Drewry, 271; *Lowe*  
*v. Dixon* (1885) 16 Q. B. D.  
458.

(b) *Wolmershausen v. Gullick* [1893] 2 Ch. 514.  
(c) *Ranelagh v. Hayes*  
(1683) 1 Vern. 189; *Antrobus*  
*v. Davidson* (1817) 3 Mer.  
579; *Ascherson v. Tredegar*

(d) Mercantile Law Amend-  
ment Act, 1856, s. 5; *Duncan*  
*Fox & Co. v. N. & S. Wales*  
*Bank* (1880) L. R. 6 App. Ca.  
11; *Re Parker* [1894] 3 Ch.  
400; *Re Wrexham Rail. Co.*  
[1899] 1 Ch. 440.

(e) *Dixon v. Steel* [1901] 2  
Ch. 602.

## CHAPTER V.—SECTION VIII.

## OF BONDS.

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*General Nature.*—Bonds are a kind of contract in very extensive use ; being adopted in a great variety of cases, where the object is to secure either the payment of money, or else the performance of, or abstention from, some act. A bond is an instrument under seal, whereby the obligor obliges himself to the obligee to pay a certain sum of money at a day, or on the happening of an event, specified. The peculiar species of bonds called ‘ Lloyd’s Bonds ’ are in reality only bonds of this character ; being instruments under the seal of a company, usually a railway company, admitting the company’s indebtedness to the obligee in the sum specified in the bond, and containing a promise by the company to the obligee to pay him such amount with interest on a future day.

Bonds which merely promise the payment of money are called *single* bonds ; but where there is a condition added, that, if the obligor does (or abstains from doing) some particular act, “ the obligation shall “ be void, or else shall remain in full force,” then the bond is a ‘ bond with a condition ’ ; the sum mentioned in the obligatory part of the bond being a penal sum or penalty, sufficient to cover any possible damage arising from the breach of the condition. The nature of the condition will in each case depend upon the particular object intended to be secured ; [thus, it may be the repayment, with interest, of the principal sum borrowed of the obligee ; or the periodical payment to him of an annuity ; or the faithful performance, by

[a third person, of the duties of an office. Whatever the condition be, in case it is not performed, the bond becomes forfeited at law, and the obligation absolute ; and such obligation charges the obligor, while living, and, after his death, his executor, or administrator, and (even at the common law if the heir is mentioned in the bond) also his heir or devisee, to the extent of the assets descending upon him.

If the condition of a bond be impossible at the time of making it, or be uncertain, the condition alone is void, and the bond shall stand single and unconditional ; for it is the folly of the obligor to enter into such an obligation, from which he can never be released.] On the other hand, if the condition be to do a thing that is either illegal at common law, or contrary to the provisions of an Act of Parliament, the whole bond is void (*a*) ; for it is an unlawful contract, and the obligee shall take no advantage of such a transaction. And the effect will be the same, even though the condition be *ex facie* legal ; if the bond was in reality given upon an illegal consideration, or if it be to effect an unlawful object which the condition does not disclose. For though, by the general rule of law, the parties to a deed are in general estopped from assigning to it any intent beyond that which appears on the instrument itself ; yet an exception is permitted in this case, upon the obvious ground of public policy (*b*). But if the bond have several conditions, some of which are legal and others illegal, and the several conditions are of a nature entirely distinct from, and not dependent upon each other, the general rule is, that the illegal conditions only shall be void, and the bond shall continue in force subject only to the legal conditions (*c*).

(*a*) Co. Litt. 206 b.

(*c*) *Green v. Price* (1845) 13

(*b*) *Collins v. Blantern* M. & W. 695.  
(1767) 2 Wils. 341.

Where the condition of a bond was possible at the date of the making of the bond, and afterwards becomes impossible, either through the act of God, or by reason of the conduct of the obligee, or if it becomes by any means illegal, in any of these cases the bond is avoided, and the obligor is discharged from all liability ; because no prudence or foresight on his part could have guarded against such a contingency (*a*).

On the forfeiture of the bond, the whole penalty was formerly recoverable at law. But courts of equity would not permit a man to acquire any collateral advantage from the bond—as, *e.g.*, to take more than his principal, interest, and costs, where the bond was conditioned for the payment of money ; or (in some cases) to recover more than the amount of the damage actually sustained, where the bond was conditioned for the performance of, or abstention from, some act. With respect to common money bonds, this principle of equity was in due course introduced into the practice of the courts of law ; and such practice was afterwards confirmed by statute (*b*). In the case of such bonds, a claim can be made by specially indorsed writ under Order III., Rule 6, of the Rules of the Supreme Court ; and the plaintiff can obtain judgment under Order XIV. (*c*). On the same equitable principle, with respect to bonds conditioned for the performance of any covenants or agreements in any deed or writing, it was enacted by the statute 8 & 9 Will. 3 (1696) c. 11 (*d*) (the provisions of which Act were recognised and preserved by the Common Law Procedure Act, 1852, and are adopted into the present practice under the Judicature Acts) that in every action upon a bond of that character, the jury shall inquire of the damages which

(*a*) Co. Litt. 206 a, 209 a ; s. 13.  
 Bro. Ab. tit. *Condition*, pl. 127 ; Shep. *Touch.* 157. (*c*) *Gerrard v. Clowes*  
 [1892] 2 Q. B. 11.  
 (*b*) 4 & 5 Anne (1705) c. 3, (*d*) S. 8.

the plaintiff has actually sustained from the breach of the condition ; and though (for his better security in the event of any future breach) he is still in such a case allowed to enter up judgment for the whole penalty, yet he is prevented from taking out execution to a larger amount than the damages which the jury had assessed (a). But the statute 8 & 9 Will. 3, c. 11 has no application to bonds conditioned for the performance of, or abstinence from, any act not forming the subject of a covenant or agreement in writing ; nor does equity in such cases (apart from the case of money bonds) necessarily give any relief (b).

Contracts secured by penalties are of an analogous character ; being agreements to do or abstain from doing certain acts, and providing that, in the event of breach, the promisor shall pay to the promisee a sum of money. Upon contracts of this nature, the question commonly arises, whether the sum shall be considered as a penalty, or as liquidated damages. This is a distinction of considerable importance ; because, if the sum is a penalty, then the promisee is permitted to recover no more than the amount of the damages which the jury shall have assessed. But if the sum is liquidated damages, he is entitled to recover the entire sum ; the parties themselves being in that case deemed to have settled and agreed the damages.

The question whether, in any particular case, a given sum is a penalty or is liquidated damages, is often difficult to determine ; depending (as it does) partly upon the nature and terms of the contract itself, and partly upon considerations of equity. The expressed intention of the parties to stipulate for a penalty or for liquidated damages is not conclusive of their real intention. For if the sum appears to be

(a) R. S. C., O. XIII. r. 14.

(b) *Strickland v. Williams*  
[1899] 1 Q. B. 382.

essentially a penalty, the law will so construe it, in disregard of the expressed intention (*a*). Conversely, although the parties may have described the stipulated sum as a penalty, the Court may nevertheless come to the conclusion that the real intention was that it should be liquidated damages (*b*). Thus, where the agreement is to pay a certain sum of money, with a proviso for the payment, in case of default, of a much larger sum of money by way of liquidated damages, the larger sum will be treated as a penalty (*c*). Where a contract contains a variety of provisions, some of them being provisions for the payment of a sum of money, and stipulates for the payment of a specified sum, by way of liquidated damages, upon breach of *all* or *any one* of the provisions, that sum will also be held a penalty (*d*). In some cases, the stipulated sum has also been treated as a penalty on the ground that it was intended to secure provisions of very different character and importance (*e*); but no absolute rule to this effect can be laid down (*f*).

In general, it may be said that, whenever it appears that the intention of the parties was to fix a sum as payable upon a breach, for the purpose of avoiding the trouble and uncertainty of assessing damages, such sum will be treated as liquidated damages and not as a penalty (*g*). In particular, where a sum is agreed to

(*a*) *Kemble v. Farren* (1829) 6 Bing. 141; *Wallis v. Smith* (1882) 21 Ch. D. 243; *Lord Elphinstone v. Monkland Iron Co.* (1886) L. R. 11 App. Ca. 332; *Public Works Commissioners v. Hills* [1906] A. C. 368.

(*b*) *Clydebank v. Yzquierdo* [1905] A. C. 6; *Diestal v. Stevenson* [1906] 2 K. B. 345.

(*c*) *Hatton v. Harris* [1892] A. C. 547.

(*d*) *Kemble v. Farren*, *ubi sup.*

(*e*) *Willson v. Love* [1896] 1 Q. B. 626.

(*f*) *Pye v. British Automobile Syndicate* [1906] 1 K. B. 425; *Diestal v. Stevenson*, *ubi sup.*

(*g*) *Law v. Redditch Local Board* [1892] 1 Q. B. 127; *Clydebank v. Yzquierdo* [1905] A. C. 6.

be paid as compensation for doing or not doing some specific act (*e.g.*, committing a trespass, or failing to complete a piece of work within a given time), the promisee will usually be entitled to judgment and execution for the entire sum, as liquidated damages (*a*). But where it is obvious that the sum stipulated for bears no reasonable proportion to the loss likely to be suffered by the breach, then it will be treated as a penalty; and only the amount of the actual loss will be recoverable.

(*a*) *Law v. Redditch Local Board*, *ubi sup.*; *Strickland v. Williams* [1899] 1 Q. B. 382; *De Soysa v. De Pless Pol* [1912] A. C. 194; *Webster v. Bosanquet* [1912] A. C. 394. (But see *Public Works Commissioners v. Hills* [1906] A. C. 368.)



## CHAPTER V.—SECTION IX.

## OF BILLS OF EXCHANGE AND PROMISSORY NOTES.

BILLS and notes are a species of written mercantile instruments by which men enter into contracts for the payment of money ; and the whole law regarding these has been codified by the Bills of Exchange Act, 1882. We shall consider, first, bills of exchange in general ; secondly, cheques, which are a peculiar species of bills of exchange ; and, thirdly, promissory notes. Finally, we shall add some observations on the general characteristics of negotiable instruments, of which bills and notes are the most important classes.

(1) BILLS OF EXCHANGE. These were originally invented for the more easy remittance of money from one country to another ; but are now of general use in all manner of pecuniary transactions. A bill of exchange is defined by the Bills of Exchange Act, 1882, as “ an unconditional order in writing addressed by one person to another, signed by the person giving it, and requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.” Where the specified person (the “ payee ”) is a fictitious or non-existing person, the bill is in effect payable to bearer (*a*).

A bill of exchange is frequently called a ‘ draft ’ ; the person who makes it is called the ‘ drawer ’ ; the person

(*a*) S. 7 (3) ; *Bank of England v. Vagliano* [1891] A. C. 107 ; *Clutton v. Attenborough* [1897] A. C. 90. (See *Vinden v. Hughes* [1905] 1 K. B. 795.)

to whom it is addressed is called the 'drawee'; and the person in whose favour it is made is called the 'payee.' But the drawer and the payee may be (and very commonly are) one and the same person.

Bills of exchange are either *inland* or *foreign*. An inland bill is one which is, or on the face of it purports to be, drawn and payable within, or drawn there upon some person resident within, the United Kingdom, which for this purpose includes the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the King's dominions (a). A foreign bill is any other bill; that is to say, a bill which is either drawn by a person residing abroad upon some person within the United Kingdom and made payable within the United Kingdom, or *vice versa*, or which is both drawn and payable abroad (b). Formerly, foreign bills of exchange were much more regarded in the eye of the law than inland ones; being thought of more public concern in commerce. But for a very long time there has not been any difference between them as regards their material legal incidents; although, in minor matters (e.g., as regards stamps), there are still certain differences.

A bill of exchange, payable to 'bearer' or to 'order,' is said to be *negotiable*—a term which (among other things) implies that the right of action upon it is, by exception from the common rule, freely assignable from man to man, in the former case by simple delivery, in the latter by indorsement coupled with delivery (c). The indorsement of a bill consists in writing one's name on the bill itself, usually on the back thereof;

(a) Bills of Exchange Act, 1882, s. 4.

(b) *Ibid.*; *Colonial Bank v. Cady* (1890) L. R. 15 App. Ca. 267.

(c) *Goodwin v. Roberts* (1875) L. R. 10 Ex. 337; 1

App. Ca. 476; *London Joint Stock Bank v. Simmons* [1892] A. C. 201. As to the difference between negotiability and assignability, see *post*, pp. 249–254.

and such indorsement may be either ‘in blank,’ or else ‘special’ (sometimes called ‘indorsement in full’) (a). An indorsement is in blank if the payee simply writes his own name; it is special if he writes “pay (X.) or “order,” and signs his own name thereto. In either case he delivers over the bill so indorsed (b). The first indorsee may in like manner indorse to another, and so on, *in infinitum*, until the bill is due, and even when it is overdue; but an overdue bill is no longer strictly negotiable (c). If the bill be payable simply to a person named, it is treated as payable to order, unless it contains words prohibiting transfer; in which last case it is not negotiable at all (d). And, on the other hand, if made payable to bearer, as is often the case with that species of bill which is known as a *cheque on a banker*, it is negotiable without any indorsement, by mere delivery. The same is true where a bill, which was originally payable to order, has been indorsed in *blank* by the payee. But note, that although an instrument may be negotiable by the law of a foreign country, it is not necessarily negotiable also in this country (e); also, that post-office orders and postal orders are not negotiable (f), although, for purposes of collection, they may be indorsed to a banker. An instrument can only be or become negotiable, by statute or by custom of merchants (g).

When the fixed time arrives at which a bill becomes payable, it is said to be ‘due’ or ‘at maturity’; but three days of grace are in such case allowed, and the bill is in general due and at maturity on the last of

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| (a) Act of 1882, ss. 32–34.   | (f) <i>Fine Art Society v. Union Bank of London</i> (1886) 17 Q. B. D. 705. |
| (b) <i>Ibid.</i> s. 21.   | (g) <i>Crouch v. Crédit Foncier</i> (1873) L. R. 8 Q. B. 374;               |
| (c) <i>Ibid.</i> s. 36.   | <i>Goodwin v. Roberts</i> (1875) L. R. 1 App. Ca. 476.                      |
| (d) <i>Ibid.</i> s. 8 (1) & (4).  |   |
| (e) <i>London &amp; County Banking Co. v. London &amp; River Plate Bank</i> (1887) 20 Q. B. D. 232. |   |

these three days. No days of grace are allowed on a bill payable 'on demand,' or 'at sight,' or 'on presentation'; though they are allowed on a bill made payable so many days after demand, or sight, or presentation (a). If the last day of grace falls on a Sunday, Christmas Day, Good Friday, or any public fast day or thanksgiving day, the bill is considered to be due and payable on the last preceding business day. But if the last day of grace falls on a Bank Holiday, the bill is considered to be due and payable on the next succeeding business day; as it is also when the last day of grace is a Sunday, and the second day of grace is a Bank Holiday.

At any time before it becomes due, and even after it becomes due, the bill is presented to the drawee for his *acceptance*; and the drawee will in general accept the bill, although (in certain cases) he may lawfully refuse to accept it—*e.g.*, where he owes nothing to the drawer, who therefore has no pretence of any title to draw upon him. An acceptance must be in writing on the bill itself, and signed by the acceptor or by some person duly authorised by him; but an acceptance will be sufficient if the acceptor merely writes his name across the face of the bill (b). An acceptance may be either *general* or *qualified*; that is, as payable at some specified place, or subject to some condition or qualification. An acceptance at a banker's, without words expressly stating that the bill is to be paid there only, is a general acceptance (c).

After acceptance, any person, who, as payee, or by transfer (whether before or after acceptance), is the holder of the bill at its maturity, is entitled to immediate payment of the amount for which it is drawn, upon presenting it to the acceptor for payment. If under such circumstances the money be not then paid,

(a) Act of 1882, ss. 10, 14.

(c) *Ibid.* s. 19.

(b) *Ibid.* s. 17.

the holder has a right to bring an action against the acceptor for the amount ; or he may have recourse to the drawer, and to every person whose name was on the bill, as indorser, when it came to the holder's hands. For each of these parties is a guarantor for the payment of the bill ; and it is on the credit of their names (though also on that of the acceptor, where it was negotiated after acceptance), that the holder is supposed to have taken the bill.

The right of the holder, however, to have recourse to the drawer and indorsers, is subject to these conditions—first, that he shall (except in certain cases) (a) have *presented* the bill to the\* acceptor for payment, on the precise day when it became due, or, if payable on demand, within a reasonable time after its issue, in order to render the drawer liable, and within a reasonable time after indorsement, in order to render an indorser liable (b) ; and, next, that he shall have given reasonable *notice of dishonour*, that is to say, notice that the bill has not been paid by the acceptor. This notice, under ordinary circumstances, must be given on the day following dishonour (c) ; or, if the persons to receive it do not reside in the same place as the payee, then by the post of that day. Notice must be sent to all parties whom it is intended to charge, or at the least to him whose name was last placed on the bill, in order that the latter may advise the party next before him, and so in succession ; each party being allowed, in turn, a day for the purpose (d).

An indorser who is called upon and obliged to pay the bill, may in his turn have recourse to the drawer, or to any indorser prior to himself ; provided such party shall have had due notice of dishonour. And the same right attaches successively to each indorser, in his

(a) Act of 1882, s. 46.

(b) *Ibid.* s. 45.

(c) *Ibid.* s. 49.

(d) *Ibid.* ss. 48, 49 (14).

turn. But the original payee has, of course, no prior party to resort to but the drawer ; and the drawer can resort to no party but the acceptor, on whom, in general, the primary liability rests throughout. For the drawer, or any other party compelled to take up and pay the bill, is always entitled to look for satisfaction to the acceptor.

Although, as has been said above, the drawee will in general accept the bill, yet it may be that, whether as between himself and the drawer he is bound or not to accept it, he will refuse acceptance ; and the law will imply such refusal on his part, if he does not accept immediately on presentment, or within the customary time, in practice twenty-four hours after the bill is left with him for acceptance (*a*). On such refusal, the holder of the bill becomes apprised, of course, that the bill is no bill at all, so far as the drawee is concerned ; and he is therefore entitled to charge the other parties, viz., the drawer and prior indorsers (if any), and to have recourse to them, as liable to pay immediately, though the bill has not yet arrived at maturity (*b*). But to justify any recourse against these parties, notice of dishonour by non-acceptance must be given to them, according to the same law and course of proceeding that was before stated with reference to giving notice of dishonour by non-payment ; and such of them as are consequently obliged to take up the bill are entitled, as in that case, to their remedy over against all prior parties (*c*).

The holder may, however, take his chance that the bill may, notwithstanding the refusal to accept, be ultimately paid by the drawee ; and may accordingly present it to him for that purpose when it comes to maturity, without thereby waiving his right of recourse

(*a*) Act of 1882, s. 42.

(*b*) *Ibid.* s. 43.

(*c*) *Ibid.* s. 48.

against the other parties (*a*). For, generally, it is at the option of the holder whether he will present the bill for acceptance or not ; the object of such presentment being only to ascertain whether the bill is likely to be paid by the acceptor, and to strengthen its credit, if possible, by the additional security of the latter's name. But if a bill be drawn payable at a specified period *after sight*, or *after demand*, a presentment for acceptance is in that case indispensable, in order to give sight to the drawee, or to make demand upon him, and thereby to fix the time at which the bill is to become due (*b*).

Independently of the notice of non-acceptance or of non-payment, the holder is also entitled to have the bill, of which either acceptance or payment is refused, *protested*. The protest—which is a formal declaration in writing made by a notary public that the bill has been refused acceptance or payment, and that the holder intends to recover all the expenses to which he may be put in consequence thereof—must contain a copy of the bill, and must be signed by the notary making it (*c*). In the case of a foreign bill, such protest is essential to the right of the holder to recover from the drawer or indorsers ; and when made, due notice of dishonour having been also given, the protest will entitle the holder to recover the amount of the bill, with interest, and all expenses, including the re-exchange, occasioned by returning it to the country where it was drawn, together with interest on such re-exchange (*d*). But upon an inland bill, the principal and interest may be recovered from these parties (due notice being given) without a protest ; which is indeed a ceremony not usually observed with respect to inland bills.

A bill, of which acceptance has been refused by the

(*a*) Act of 1882, s. 48.

(*b*) *Ibid.* s. 39.

(*c*) *Ibid.* s. 51.

(*d*) *Ibid.* s. 57.

drawee, is sometimes ‘accepted *supra protest*’; that is to say, for the honour of the drawer or (as the case may be) for the honour of an indorser. In these cases, some friend of the drawer or indorser intervenes, to prevent the bill from being sent back upon him as unpaid, by placing his own name upon it as acceptor; after a protest has been drawn up declaratory of its dishonour by the drawee (a). Where an acceptance for honour does not express for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer. An acceptance *supra protest*, or for honour, operates, not as an absolute engagement to pay; but only as an engagement to pay in the event of the bill being presented, dishonoured, and protested upon subsequent presentment to the drawee for payment, when it arrives at maturity, and of its being afterwards duly presented for payment to the ‘acceptor for honour,’ with due notice of these facts. On these conditions being fulfilled, the acceptor for honour is then absolutely liable, as if he had accepted in the capacity of drawee, so far as regards the claim of any person whose name stands subsequent to his for whose honour the acceptance was made; while, on the other hand, such an acceptor, upon being obliged to pay, is subrogated to the rights of the holder against the person for whose honour he accepted, or against any party antecedent to such person in the series of names on the bill (b). A bill which has been protested for non-payment may be *paid* by some third person ‘for honour *supra protest*’; the result being similar to the case above mentioned (c).

(2) CHEQUES. A *cheque* is a bill of exchange drawn on a banker payable on demand; and, subject to certain special provisions, contained in Bills of Exchange Acts, 1882 and 1906, the same law is applicable

(a) Act of 1882, s. 65.

(c) *Ibid.* s. 68.

(b) *Ibid.* ss. 66, 67, 68 (5).



to cheques as to other bills of exchange (*a*). Inasmuch as a cheque is payable on demand, there is no occasion to obtain the banker's acceptance of it. His duty and authority to pay it rest upon the previous contract between him and his customer, and upon the state of the customer's account; and such duty and authority are put an end to by countermand of payment, or by notice of the customer's death or bankruptcy (*b*).

A 'crossed cheque' is one which bears on its face two parallel transverse lines, with or without the words 'and company' written between them. A cheque simply so crossed is said to be 'crossed generally'; but the name of some particular banker may also be added, in which case the cheque is said to be 'crossed specially' (*c*). The most important provisions relating to crossed cheques are as follows:—

(1) When a cheque is crossed generally, the banker on whom it is drawn must not pay it otherwise than to a banker; and where it is crossed specially, the banker on whom it is drawn must pay it only to the particular banker to whom it is crossed, or to his agent for collection (*d*). If he pays it to any other person, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid, *e.g.*, if such a cheque is stolen, and paid over the counter to the thief or a person to whom he has negotiated it (*e*).

(2) Where a banker has, in good faith and without negligence, paid according to its tenor a cheque, crossed either generally or specially, both he and (if the cheque has come into the hands of the payee) the drawer, will be in the same position as they would respectively have been in, if the amount of the cheque had been paid to the true owner thereof (*f*).

(*a*) Act of 1882, s. 73.

(*b*) *Ibid.* s. 75.

(*c*) *Ibid.* s. 76.

(*d*) *Ibid.* s. 79 (2).

(*e*) *Ibid.*

(*f*) *Ibid.* s. 80.

(3) When a person takes a cheque crossed with the words 'not negotiable,' he will not have, or be capable of giving, a better title to the cheque than that which the person from whom he took it had (a).

(4) When a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally, or specially to himself, and the customer has no title or a defective title thereto, the banker incurs no liability to the true owner of the cheque by reason only of receiving such payment (b); and a banker receives payment of a crossed cheque for a customer, even though he credits the customer's account with the amount of the cheque before receiving payment thereof (c).

(3) PROMISSORY NOTES. By the Bills of Exchange Act, 1882 (d), a promissory note is defined as "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer." These instruments, if made payable to order or bearer, were, by the statutes 3 & 4 Anne (1704), c. 8, and 7 Anne (1708), c. 25, placed upon the same footing, as to negotiability and otherwise, with inland bills of exchange. So that almost every point of law which applies to the one may be taken generally as applicable also to the other; with only this difference, that, as a note is originally made between but two parties, viz., the maker and the payee, there being no third party, or drawee, as in the case of a bill, all those legal incidents of a bill which

(a) Act of 1882, s. 81.

[1903] A. C. 240.

(b) *Ibid.* s. 82; *G. W. Railway v. London & County Bank* [1901] A. C. 414; *Capital and Counties Bank v. Gordon*

(c) Bills of Exchange (Crossed Cheques) Act, 1906.

(d) S. 83.

regard the position of the drawee, and the nature and effect of an acceptance, are, of course foreign to a note(a). The maker of the note stands, in fact, in the place of both drawer and acceptor. He is the party in every case primarily liable; and to him, accordingly, the holder presents the note in the first instance for payment, when it arrives at maturity. On his failure to pay, the holder may then resort to the indorsers, each of whom has a successive right of recourse against the names anterior to his own; leaving to the first indorser, or original payee, no remedy except against the maker himself. And there is this further difference to be observed between bills and notes; namely, that a note, if made payable at any specified place, must be presented there for payment, even though the restrictive negative words 'and not elsewhere' should not have been added (b).

Bills of exchange and promissory notes have, as 'negotiable instruments,' some legal properties of a peculiar kind.

First, although they are *choses in action*, a 'holder in due course' (i.e., a *bonâ fide* transferee for value by indorsement or delivery, as the case may be, before the maturity of the bill or note) takes them free from the equities affecting them in the hands of the assignor. So much so that, though, by the general rule of law, a party can give no better title to a thing than he himself has, yet he who has obtained by wrongful means, or even by felonious means, the possession of a bill or note drawn payable to order and indorsed in blank, or drawn payable to bearer, is competent to make a valid transfer of the instrument and its contents, by merely delivering it before maturity for valuable consideration to a person unaware of the defect in his

(a) Act of 1882, s. 89.

(b) *Ibid.* s. 87.

title (a). In this particular, the instruments in question—and indeed all others of a negotiable kind, which are transferable by mere delivery (with or without indorsement)—are, for the benefit of commerce, placed upon the same basis with the current coin of the realm ; which, as we have already had occasion to observe, passes freely from man to man, without regard to any defect in the title of him who pays it over, provided it be paid, for valuable consideration, to an innocent party (b). A forged indorsement is, as a rule, wholly inoperative ; and no person, though acting in good faith, can acquire any rights thereunder (c). But to this rule there are certain exceptions. For :—

(i.) by an express provision contained in the Bills of Exchange Act, 1882 (d), a banker who, in the case of a bill payable to order or demand, and drawn upon himself, pays the amount thereof in good faith and in the ordinary course of business, is not liable to make good the amount so paid away, although it should be afterwards shown that the indorsement was a forgery ;

(ii.) when a bill of exchange or cheque is drawn payable to a fictitious or non-existent person, it is treated as payable to bearer (e) ; and a good title thereto will be acquired accordingly, although the indorsement is a forgery. A real person may be a fictitious person for the purpose of this provision ; where the drawer had no intention that the payee named should receive payment (f) ;

(a) Act of 1882, ss. 29, 54, 55.

(b) See *ante*, p. 84.

(c) Act of 1882, s. 24 ; *Vinden v. Hughes* [1905] 1 K. B. 795.

(d) Act of 1882, s. 60.

(e) *Ibid.* s. 7 (3).

(f) *Vagliano v. Bank of England* [1891] A. C. 107 ; *Clutton v. Attenborough* [1897] A. C. 90 ; *Macbeth v. North and South Wales Bank* [1908] A. C. 137.

(iii.) in some foreign countries, a good title may be obtained under a forged indorsement; and the transfer of a bill so made in such a country, and held valid there, will be upheld in our courts (a);

(iv.) where a bill was paid and the money received by the holder in good faith, it was held that if such an interval of time had elapsed that the position of the holder might have been altered, the money could not be recovered from the holder, although some of the indorsements on the bill subsequently proved to be forgeries (b).

Second, although in other cases of simple contract the party who sues thereon for the breach of contract is obliged to prove the consideration on which the promise was made, and on failure of such proof will be defeated, yet no evidence of the consideration is required from the holder of a bill or note. For he is in general called upon to prove nothing beyond the signature thereto of the party charged; every bill or note being deemed, in law, to carry with it, *primâ facie*, a sufficient consideration (c). If, however, the bill or note were shown to have been given for an illegal consideration, or obtained by fraud or duress, the holder would be required to prove that, subsequent to the illegality, fraud, or duress, value had in good faith been given for it; and, even then, he might be defeated by proof that he was himself a party to such illegality, fraud, or duress (d). A cheque, payable in England, but given abroad in

(a) *Embiricos v. Anglo-Austrian Bank* [1905] 1 K. B. 677.

(b) *London and River Plate Bank v. Bank of Liverpool* [1896] 1 Q. B. 7.

(c) Act of 1882, s. 30.

(d) *Ibid.* s. 30 (2); s. 29 (3); *Bailey v. Bidwell* (1844). 13 M. & W 73. When the

holder of bill or note is the person to whom the instrument was originally delivered, the burden of proof remains on the party sued to show that the holder had knowledge of the illegality, fraud, or duress (*Talbot v. Van Boris* [1911] 1 K. B. 854).

payment of a gaming transaction which was lawful in the country where it took place, is held to be given for an illegal consideration within the Gaming Act, 1835 ; and the holder who was a party to such transaction cannot recover on it (a).

But although consideration for a bill or note is presumed *primâ facie*, yet the absence of consideration may be proved by any person who is sued upon it. It would not however suffice for him to prove that he himself had received no consideration ; he must go further, and show that at no time since he became a party to the bill was value given. If this burden of proof is discharged, a party known as an ‘ accommodation party,’ that is, one who, in fact, receives no consideration for a bill, is not liable on the bill to any other party except a holder for value, *i.e.*, a person who has either himself given value for it, or has taken the bill through some prior party who has given value for it (b).

Third, bills are to some extent excepted from the common law rule that any material alteration in a written instrument avoids the instrument. For, by the Bills of Exchange Act, 1882 (c), an alteration that is ‘ not apparent,’ does not avoid a bill or note in the hands of a holder in due course ; and such holder may avail himself of the bill as originally framed, as if it had not been altered. But though this provision extends to promissory notes generally, yet it has been held that it has no application to Bank of England notes ; so that even an alteration in the number of such a note renders it absolutely void (d).

Finally, a bill or note differs from other simple con-

(a) *Moulis v. Owen* [1907] 1 K. B. 746.

(b) Act of 1882, ss. 28 and 27 (2).

(c) S. 64.

(d) *Suffell v. Bank of England* (1882) 9 Q. B. D. 555.

tracts in that the holder can, without receiving any consideration, and without executing a deed, validly discharge the parties liable upon it ; either by a *renunciation*, which must be evidenced by writing or by delivery up of the bill or note, or by an intentional *cancellation* apparent upon the bill or note (a).

(a) Act of 1882, ss. 62, 63.

## CHAPTER V.—SECTION X.

## OF MARINE, FIRE, AND LIFE INSURANCE.

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A POLICY of insurance is an instrument in writing by which one party, in consideration of a premium, or series of premiums, engages to indemnify another against a contingent loss, by making him a payment in compensation, if and when the event happens by which the loss accrues. The effect of such a contract is obviously to protect the latter party (or the ‘assured,’ as he is called) from the hazard to which he would otherwise be exposed, and to throw that hazard upon the ‘insurer,’ or party giving the indemnity, who, if he carries on a general insurance business, by balancing the good against the bad, and by adjusting the premiums as the circumstances seem to require, may not only escape loss, but may even secure for himself considerable profit from the result. Moreover, associations and other companies and corporations have been established for carrying on the business of insurance on a large scale; and the risks of any particularly heavy insurance are usually distributed among a great number of insurers.

The losses most commonly insured against are those occasioned by the storms and perils of the sea, or by fire, or by death; which insurances are therefore called respectively marine insurances, fire insurances, and life insurances. But insurances may be, and at the present day very usually are, effected also against losses resulting from other causes, as from



burglary (*a*), physical accident, illness, and the like (*b*), or against claims which may be made (*e.g.*, under the Workmen's Compensation Act (*c*)) against the assured. And a valid insurance has been effected even against loss sustained to a trading port through the attacks of foreign enemies therein (*d*); while insurances to secure the payment of debentures (*e*) are now in common use. But it will be sufficient if we discuss the subject of insurance in its three principal branches already mentioned.

1. MARINE INSURANCE is said to have been originally introduced into this country by the Lombards in the course of the thirteenth century. The business of marine insurance is commonly undertaken by individuals or firms carrying on business in private partnership. A certain number of these persons or firms usually subscribe the instrument (or *policy*, as it is called); each engaging, on his or their own separate account, to indemnify the assured to the extent of a particular sum of money, being a proportion of the whole amount insured. Such persons are called, with reference to the method used of thus subscribing their names, *underwriters*. They belong, for the most part, to an association called 'Lloyd's' (*f*), the members of which underwrite each other's policies; and the association, for better protecting its members against avoidable losses, is enabled, with the sanction of the Board of Trade, to

(*a*) *Roberts v. Security Co.* [1897] 1 Q. B. 111; *Saqui & Lawrence v. Stearns* [1911] 1 K. B. 426.

(*b*) *Pugh v. L. B. & S. C. R. Co.* [1896] 2 Q. B. 248.

(*c*) See *post*, pp. 369—374.

(*d*) *Carter v. Boehm* (1763) 3 Burr. 1905. (See *Nigel Gold Mining Co. v. Hoade* [1901] 2 K. B. 849; *Jansen v. Driefontein Consolidated Mines*

[1902] A. C. 484.)

(*e*) *Finlay v. Mexican Investment Corporation* [1897] 1 Q. B. 517; *Law Guarantee, &c. Society v. Munich Re-insurance Co.* [1912] 1 Ch. 138.

(*f*) Now incorporated by Lloyd's Act, 1871 (34 & 35 Vict. c. xxi.). See Martin, *History of Lloyd's*, and Maitland, *Collected Papers*, III., 372.

establish signal stations and signal houses, and to arrange for telegraphic communication therewith (*a*). But marine insurances may also be made by bodies incorporated by private Act or charter ; or by limited companies established under the Companies (Consolidation) Act, 1908. For although the Royal Exchange and London Assurance Companies at one time enjoyed, under certain statutes, a practical monopoly of the business of underwriting, this monopoly was abolished by the statute 5 Geo. 4 (1824) c. 114.

Special regulations have been made by the legislature relative to marine insurance, whether effected by companies or otherwise ; and the law relating to the subject is now codified in the Marine Insurance Act, 1906, which enacts in statutory form the rules laid down by the Courts, and embodies the provisions (so far as still subsisting) of the Marine Insurance Acts, 1745 and 1788, and the Policies of Marine Insurance Act, 1868, which are now repealed.

A contract of marine insurance is defined by the Act (*b*) as a contract whereby the insurer undertakes to indemnify the insured against marine losses ; that is to say, the losses incident to marine adventure. Such a contract may include mixed sea and land risks (*c*). Every contract of marine insurance made by way of gaming or wagering is declared to be void ; and a contract of marine insurance is deemed to be a gaming or wagering contract (*a*) where the assured has not an insurable interest, and the contract is entered into with no expectation of acquiring such an interest, (*b*) where the policy contains such a term as “ interest “ or no interest,” “ without further proof of interest “ than the policy itself,” or “ without benefit of salvage “ to the insurer ” (*d*). Gambling on loss by marine perils

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| ( <i>a</i> ) Lloyd's Signal Stations | ( <i>c</i> ) S. 2. |
| Act, 1888.                           | ( <i>d</i> ) S. 4. |
| ( <i>b</i> ) S. 1.                   |                    |

is moreover made a criminal offence by the Marine Insurance (Gambling Policies) Act, 1909.

Subject to the provisions of the Act, every person has an insurable interest who is interested in a marine adventure (*a*); and the assured must be interested in the subject-matter insured at the time of the loss, though not necessarily when the insurance is effected (*b*). The contract of marine insurance is declared to be one *uberrimæ fidei* (*c*); and, if the utmost good faith is not observed by either party, the contract may be avoided by the other. Therefore, the assured is required to disclose to the insurer, before the contract is concluded, every material circumstance (with certain exceptions, such as circumstances which are known or presumed to be known to the insurer, or which diminish the risk) which is known to the assured, including every circumstance which in the ordinary course of business ought to be known to him (*d*). If he fails to make such disclosure, the insurer may avoid the contract.

As regards form, the Act provides that no contract of marine insurance shall be admissible in evidence unless embodied in a policy in accordance with the Act (*e*); and such policy must specify (1) the name of the assured or his agent who effects the insurance, (2) the subject-matter and risk insured against, (3) the voyage or period of time covered by the insurance, (4) the sum or sums insured, (5) the name or names

(*a*) S. 5. (This definition is not very lucid; but, presumably, the Act means a pecuniary interest, *i.e.*, that the insured must stand to lose money by the failure or gain by the success of a marine adventure.)

(*b*) S. 6.

(*c*) Act of 1906, s. 17; *Thames and Mersey Marine Insurance Co. v. Gunford Ship*

*Co.* [1911] A. C. 529; *William Pickersgill & Sons, Ltd. v. London, &c. Insurance Co.* [1912] 3 K. B. 614; *Cantiere Meccanico v. Janson* [1912] 3 K. B. 452; *Scottish Line v. London, &c. Co.* [1912] 3 K. B. 51.

(*d*) Act of 1906, s. 18.

(*e*) *Ibid.* s. 22; *Genfork-sikrings, &c. Co. of Copenhagen v. Da Costa* [1911] 1 K. B. 137.

of the insurers (a). But the contract is deemed to be concluded as soon as the proposal of the assured is accepted by the insurer; whether the policy be then issued or not. And for the purpose of showing the time of acceptance, the slip, covering note, or other customary memorandum, though unstamped, may be referred to (b). A marine policy must be signed by or on behalf of the insurer; but, in the case of a corporation, the corporate seal may be sufficient. Each subscription, unless the contrary be expressed, constitutes a distinct contract (c).

The Act recognises the practice of *re-insurance*, that is to say, a contract whereby an insurer seeks to relieve himself from a risk which he may have undertaken, by sharing it with some other insurer (d); and every insurer is declared to have an insurable interest, and may re-insure in respect thereof (e). This contract of re-insurance must be distinguished from what is sometimes called *double insurance*; which occurs where two or more policies are effected by or on behalf of the insured on the same adventure and interest, and the sums assured exceed the indemnity allowed by the Act (f). These latter contracts were always held lawful; and the amount of the actual loss was recoverable by the insured against any or either of the underwriters. But, inasmuch as a marine insurance is a contract of indemnity only, the law will not allow the insured to recover anything beyond the amount of his loss. And therefore, if he obtains

(a) Act of 1906, s. 23.

(b) *Ibid.* s. 21.

(c) *Ibid.* s. 24.

(d) Such contracts of re-insurance were at one time forbidden by the Marine Insurance Act, 1745, s. 4. (See *Delver v. Barnes* (1807) 1 Taunt. 48; *Mackenzie v.*

*Whitworth* (1876) 1 Ex. D. 36.)

(e) Act of 1906, s. 9; *Reliance Marine Insurance Co. v. Duder* [1913] 1 K. B. 265; *Scottish National Insurance Co. v. Poole* (1912) 29 T. L. R. 16.

(f) Act of 1906, s. 32.

full indemnity upon any of his policies, he may not further proceed on the others; and he must in any case give credit for any sum already received by him under any other policy. If he has received any sum in excess of his loss, he is deemed to hold it in trust for the insurers according to their rights of contribution among themselves; for an underwriter who has paid in excess of his own share is (like one of several co-sureties) entitled to contribution from the other underwriters who have underwritten the same loss (*a*).

Marine policies are divided into 'voyage' and 'time policies.' Where the contract is to insure the subject-matter 'at and from' one place to another or others, the policy is called a 'voyage policy'; and where the contract is to insure the subject-matter for a definite period of time, the policy is called a 'time policy.' A time policy, which is made for any time exceeding twelve months, is invalid (*b*); subject to the provision permitting a 'continuation clause'—*i.e.*, a clause providing that if the vessel is at sea on the expiration of the period, the insurance shall continue until her arrival (*c*). A marine policy is assignable, unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss, by indorsement thereon or in other customary manner. The assignee is entitled to sue upon it in his own name; but the insurer is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected (*d*). And an assured who has no interest cannot assign (*e*).

(*a*) *Davis v. Gilbert* (1777) Marsh. 140; Act of 1906, s. 80.

(*b*) Act of 1906; s. 25.

(*c*) Finance Act, 1901, s. 11.

(*d*) Act of 1906, s. 50; *William Pickersgill & Sons, Ltd. v. London, &c. Insurance Co., Ltd.* [1912] 3 K. B. 614.

(*e*) Act of 1906, s. 51.

The subject-matter insured is most usually the ship, or the cargo, or both ; though it is also a common practice to insure the freight which the vessel is about to earn, or the profits expected from the cargo (*a*). The risks insured against are (unless excepted) usually the following (*b*) :—perils of the seas, which comprise all the dangers on the sea incident to navigation (*c*) ; capture by a public enemy (*d*), or by pirates (*e*) ; fire (*f*) ; *jettisons*, that is, the voluntary throwing overboard of goods or merchandise, to ease the ship in time of danger or distress (*g*) ; arrests or embargoes laid on by public authority (*h*) ; and fraudulent conduct (or *barratry*) on the part of the master or mariners (*i*).

Against all these risks the underwriters, in consideration of a premium paid down, severally engage to give their indemnity to the extent of a specified sum (called the 'subscription'), for the particular purposes mentioned in the policy. And even if the vessel should have been lost at the time when the policy is executed (such fact being then unknown to both parties), the insurance is, by the ordinary form of these contracts, still binding ; it being the practice in our English policies to insure 'lost or not lost' (*k*). But the voyage marked out or contemplated by the policy

(*a*) *Camden v. Anderson* (1794) 5 T. R. 709 ; Act of 1906, s. 3.

(*b*) Cf. Act of 1906, s. 3 ; which defines "maritime "perils."

(*c*) *Thames and Mersey Insurance Co. v. Hamilton* (1887) L. R. 12 App. Ca. 484.

(*d*) *Ruys v. Royal Exchange* [1897] 2 Q. B. 135.

(*e*) *Dean v. Hornby* (1854) 3 El. & Bl. 180.

(*f*) *Woodside v. Globe Co.*

[1896] 1 Q. B. 105.

(*g*) *Royal Exchange Shipping Co. v. Dixon* (1887) L. R. 12 App. Ca. 11.

(*h*) *Robinson Gold Mining Co. v. Alliance, &c. Assurance Co.* [1902] 2 K. B. 489.

(*i*) *Small v. United Kingdom Insurance Association* [1897] 2 Q. B. 311.

(*k*) Act of 1906, s. 6, and Schedule I. ; *Sutherland v. Pratt* (1843) 11 M. & W. 296.

must be always exactly pursued; for the slightest deviation from it, and every delay in prosecuting it, without lawful excuse, such as circumstances of necessity, will render the insurance ineffectual—and that whether the loss be occasioned by the deviation or not, and whether the ship resume her proper course or not before the loss happens (*a*). But policies often contain a clause permitting deviation subject to specified conditions (*b*).

Every voyage policy, too, is made under an implied warranty, that the ship shall, at the time of her setting out, be seaworthy, that is, in a condition to perform the voyage; and if the case turns out to have been otherwise, the assured is not entitled to recover in the event of a loss, whether the loss have proceeded from the defects in her condition, or from any other cause. In the case of a time policy, there is no such implied warranty; but where, with the privity of the insured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness (*c*).

The insured in a policy of marine insurance is entitled to claim upon the policy, not only where he is able to give direct proof of loss, but where he can show circumstances from which a loss may reasonably be presumed—as that a sufficient time has elapsed for receiving intelligence of the vessel since her departure, and that none has been received; for in such circumstances an actual total loss may be presumed (*d*). But where direct proof of the calamity

(*a*) Act of 1906, ss. 43–49; *Hamilton v. Sheddon* (1837) 3 M. & W. 49; *Wingate v. Foster* (1878) 3 Q. B. D. 582.

(*b*) *Mentz, Decker & Co. v. Maritime Insurance Co.* [1910] 1 K. B. 133.

(*c*) Act of 1906, s. 39;

*Hedley v. Pinkney* [1892] 1 Q. B. 64; *Re Margetts* [1901] 2 K. B. 792; *Greenock Steamship Co. v. Maritime Insurance Co.* [1903] 2 K. B. 657.

(*d*) Act of 1906, s. 58; *Koster v. Reed* (1827) 6 B. & C.

19.

is given, it may turn out that the loss is either a *total*, or a *partial* loss (a); and a total loss may be either *actual* or *constructive*. Total loss is said to be 'actual' where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof (b). It is said to be 'constructive' where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred, *e.g.*, where the insured is deprived of the possession of his ship or goods, and it is unlikely that he can recover them, or the cost of recovering them would exceed their value when recovered; or, in case of damage to a ship, where she is so damaged that the cost of repairing the damage would exceed the value of the ship when repaired; or, in case of goods, where the cost of repairing the damage and forwarding the goods would exceed their value on arrival (c). In every case of constructive total loss, the assured may either treat the loss as partial, or abandon the subject-matter to the insurer, and treat the loss as an actual total loss (d). Where there is a valid abandonment, the insurer is entitled to take over the interest of the insured in whatever may remain of the subject-matter, and all proprietary rights incidental thereto (e). But in cases of constructive total loss, unless notice of

(a) Act of 1906, s. 56; *Roux v. Salvador* (1836) 3 Bing. N. C. 266; *Cossmann v. West* (1887) L. R. 13 App. Ca. 160.

(b) Act of 1906, s. 57; and see cases cited in note (a), *supra*.

(c) Act of 1906, s. 60; *Moss*

*v. Smith* (1850) 9 C. B. 103. The law laid down in *Macbeth & Co. v. Maritime Insurance Co.* [1903] A. C. 144, has been altered by the Act (*Hall v. Hayman* [1912] 2 K. B. 5).

(d) Act of 1906, s. 61.

(e) *Ibid.* s. 63.



abandonment be given within a reasonable time after intelligence of the circumstance is received, the loss will be treated as partial only (a).

We now come to consider the liability of the insurer in case of loss. In this connection it is necessary to explain the distinction between a 'valued' and an 'unvalued' policy, and the meaning of the term 'measure of indemnity.' A *valued* policy is one which specifies the agreed value of the subject-matter insured. Subject to the provisions of the Act, and in the absence of fraud, the value fixed by the policy is, as between the parties, conclusive of the insurable value, whether the loss be total or partial, though it is not conclusive (in the absence of provision to the contrary) for the purpose of determining whether there has been a constructive total loss (b). An *unvalued* policy is one which does not specify the value of the subject-matter, but (subject to the limit of the sum insured) leaves the insurable value to be subsequently ascertained in accordance with the provisions of the Act (c).

The measure of indemnity for which the insurer of a marine risk is liable, is the sum which the insured can recover in respect of a loss; assuming him to be fully insured to the extent of the insurable value in the case of an unvalued policy, or to the extent of the fixed value in the case of a valued policy. No insurer can be liable beyond the measure of indemnity; but if his subscription is less than the measure of indemnity, he will be liable for such proportion of the measure of indemnity as his subscription bears to the insurable value or the fixed value, as the case may be (d).

The measure of indemnity is ascertained as follows :—

(a) Act of 1906, s. 62;  
*Roux v. Salvador, ubi sup.*;  
*Currie v. Bombay Insurance*  
*Co.* (1869) L. R. 3 P. C. 72.

(b) Act of 1906, s. 27.  
 (c) *Ibid.* s. 28.  
 (d) *Ibid.* s. 67.

(1) In the case of a total loss of the subject-matter, whether ship, freight, or goods, the measure of indemnity is the sum fixed in the case of a valued policy, or the insurable value in the case of an unvalued policy (*a*).

(2) In the case of damage to a ship, the measure of indemnity is the reasonable cost of repair, if and so far as the ship has been repaired ; or the reasonable depreciation, if and so far as the damage remains unrepaired (*b*).

(3) In the case of partial loss of freight, the measure of indemnity is such a proportion of the value fixed, or the insurable value (as the case may be), as the freight lost bears to the whole freight which was at the risk of the insured under the policy (*c*).

(4) Where part of the goods has been totally lost, the measure of indemnity is, in the case of an unvalued policy, the insurable value of the part lost ; and in the case of a valued policy, such proportion of the value fixed, as the insurable value of the part lost bears to the insurable value of the whole (*d*).

(5) Where the whole or part of the goods has been damaged, the measure of indemnity is such proportion of the value fixed, or of the insurable value (as the case may be), as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value (*e*).

Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against, and also general average losses and contributions (so far as incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against) may be recovered by the insured from the insurer (*f*). Salvage charges mean

(*a*) Act of 1906, s. 68.

(*b*) *Ibid.* s. 69.

(*c*) *Ibid.* s. 70.

(*d*) *Ibid.* s. 71 (1), (2).

(*e*) *Ibid.* s. 71 (3).

(*f*) *Ibid.* ss. 65, 66.

charges recoverable under maritime law by a person who has rendered services in the rescue of ship or cargo, independently of contract. Other expenses (though not falling within this definition) properly incurred for the purpose of averting a peril insured against, may also be recovered (a).

A 'general average' loss is a loss caused by, or directly consequential on, a general average act. It includes a general average expenditure, as well as a general average sacrifice (b). There is a general average act, where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril, for the purpose of preserving the property imperilled in the common adventure (c); as where, in a storm, jettison is made of any goods, or sails or masts are cut away, *levandæ navis causâ* (d). Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested; and such contribution is called a *general average contribution* (e). But, to found this obligation, it is essential that the ship should be eventually saved, and that the sacrifice so made should have in fact conduced to her preservation; and also that the cargo so jettisoned was laden in a proper manner. For goods stowed upon the deck (unless where a special custom authorises deck stowage) are not the subject of general average (f). Nor are insurers, as a rule, liable for loss of goods carried on deck during a voyage by sea. But this rule seems inapplicable to river voyages (g).

By our law, not only the ship and cargo, but also

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|-----------------------------------|--------------------------------------|
| (a) Act of 1906, s. 65.           | (f) <i>Wright v. Marwood</i>         |
| (b) <i>Ibid.</i> s. 66 (1).       | (1881) 7 Q. B. D. 62.                |
| (c) <i>Ibid.</i> s. 66 (2).       | (g) <i>Apollinaris Co. v. Nord</i>   |
| (d) <i>Strang v. Scott</i> (1889) | <i>Deutsche Insurance Co.</i> [1904] |
| L. R. 14 App. Ca. 601.            | 1 K. B. 252.                         |
| (e) Act of 1906, s. 66 (3).       |                                      |

the freight, is liable to contribute to a general average. The way of settling the contribution among the several parties, on the arrival of the ship at the port of destination, is to ascertain the proportion that the value of the property sacrificed bears to the entire value of the whole ship, cargo, and freight—such estimate being made according to the net value of the several articles, if there brought to sale—and to make the property of each owner (including the property sacrificed) contribute to the common loss, in the proportion so found. The mutual contributions are settled by the award of persons called *average adjusters* or *staters* (a).

Subject to any express provision in the policy, where the insured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him ; and, in the case of a general average sacrifice, in respect of the whole loss, without having enforced his right of contribution from the other parties liable to contribute. He may also recover from the insurer any general average contribution which he has paid, or is liable to pay, in respect of the subject insured (b). But, in the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against (c).

The Act provides for the return of the premium upon a failure of the consideration for which it was paid ; as in cases where the policy is void, without any fraud or illegality on the part of the assured, or where the subject-matter insured has never been imperilled (d).

(a) *Wavertree Co. v. Love*  
[1897] A. C. 373.

(b) Act of 1906, s. 66 (4), (5).

(c) *Ibid.* s. 66 (6).

(d) *Ibid.* s. 84.

(2) FIRE AND LIFE INSURANCE.—A fire policy engages, that, in consideration of a single premium or periodical payments of premiums, the insurance company will pay to the insured compensation for such loss as may occur by fire to his specified property within a certain period, to an amount not exceeding a particular sum fixed for that purpose by the policy.

A life policy usually engages, that, in consideration of a single premium or a number of periodical premiums, the insurance company will pay, on the death of some individual, or on his death within a limited period, a certain sum of money therein specified; that is, will pay it to the party effecting the insurance, supposing it to be effected by a stranger having an interest in the life insured, or to the executors or administrators of the party whose life is insured, supposing him to effect it for his own benefit. Under the Policies of Assurance Act, 1867 (*a*), any person becoming entitled to a life policy by assignment or other derivative title, and having a right in equity to give an effectual discharge to the insurance company, is enabled, on giving notice of such assignment to the company, to sue on the policy in his own name, as soon as it becomes a claim.

By the Assurance Companies Act, 1909 (*b*), certain provisions are made for securing the solvency of insurance societies; in particular, by requiring every life, fire, accident, employers' liability, or bond investment assurance society to deposit in court a sum of 20,000*l.* By the Companies (Consolidation) Act, 1908, every insurance company is bound to publish twice a

(a) 30 & 31 Vict. c. 144, s. 1.

(b) Re-enacting and extending the provisions of the Life Assurance Companies Acts, 1870 to 1872, and the Employers' Liability (Insurance Companies) Act, 1907. (See *Re Popular Life Assur-*

*ance Co.* [1909] 1 Ch. 80; *Re Life and Health Assurance Co.* [1910] 1 Ch. 458; *Re Royal Exchange Assurance Corporation* [1910] W. N. 211; *Joseph v. Law Integrity Insurance Co.* [1912] 2 Ch. 582.)

year a full statement of its capital, and of its assets and liabilities (a).

It is equally a rule affecting insurance contracts against fire, or on life, as in the case of insurance against loss at sea, that the insured must have an 'interest' in the subject-matter thereof (either in his own right or as a trustee). Beyond the extent to which he has such interest, the contract will not be effectual; and the interest must be one of a pecuniary kind (b). For the Life Assurance Act, 1774, provides that no insurance shall be made on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose benefit, or on whose account, such policies are made, have no interest, or by way of gaming or wagering; and every insurance so made is rendered void. It is also unlawful to make any policy, without inserting therein the name of the person interested, or for whose use, benefit, or account it is made (c); and no greater sum may be recovered from the insurer than the amount of the interest of the insured, in the life or lives, or other event or events. But a person has always been considered as having an interest in his own life (though not in that of his parent or child), of a kind that justifies his effecting an insurance upon it to any amount (d); and a married woman has a similar interest in the life of her husband (e), and a husband in the life of his wife (f); while a policy effected on the life of one's

(a) S. 108.

(b) Life Assurance Act, 1774; *Dalby v. India, &c. Assurance Company* (1855) 15 C. B. 365; *Hebdon v. West* (1862) 3 B. & S. 579; *Inglis v. Stock* (1885) L. R. 10 App. Ca. 263.

(c) *Hodson v. Observer Life Assurance Company* (1858) 8 E. & B. 40.

(d) *Halford v. Kymer* (1830)

10 B. & C. 729.

(e) *Read v. Royal Exchange Assurance Co.* (1809) Peake, Add. Cas. 70; *Barnes v. London Assurance Co.* [1892] 1 Q. B. 864; *Harse v. Pearl Life Assurance Co.* [1904] 1 K. B. 558.

(f) *Griffiths v. Fleming* [1909] 1 K. B. 805.

debtor has always been valid to the extent of the amount of the debt. It has, moreover, been decided (a), that a policy on the life of another, in which the insured was interested at the time of effecting the policy, is not invalidated by the Act of 1774, merely because such interest has ceased before the death; and it has also been decided (b), that, in the case of an insurance against accidents, the assured may recover, on the accident policy, the full amount of his insurance, though he may also have recovered damages against the party by whom the accident was caused. Moreover, it is now expressly enacted (c), that when an action is brought to recover damages under the Fatal Accidents Act, 1846 (d), no account is to be taken of any sums paid or payable on the decease of the person whose death gave rise to the action, under any contract of insurance.

It is further to be observed, that, under the Married Women's Property Act, 1882, a husband may insure his own life expressly by way of trust for the benefit of his wife and children, and (subject thereto) for his own benefit; also, that a wife may effect a policy either on her own life or on that of her husband (e), for her own benefit, or that of her husband or her children. In such cases of policies made for the benefit of others than the insured, the policy moneys do not, so long as any object of the trust remains unperformed, form part

(a) *Dalby v. The India and London Life Assurance Company* (1855) 15 C. B. 365.

(b) *Bradburn v. Great Western Railway Company* (1874) L. R. 10 Exch. 1.

(c) Fatal Accidents (Damages) Act, 1908, s. 1. The law was formerly otherwise (*Hicks v. Newport Railway Co.* (1857) 4 B. & S. 303, n.;

*Grand Trunk Railway v. Jennings* (1888) L. R. 13 App. Ca. 800).

(d) Commonly called 'Lord Campbell's Act.' As to its scope, see *post*, vol. iii. pp. 479-480.

(e) *In re Davies' Policy* [1892] 1 Ch. 90; *Griffiths v. Fleming* [1909] 1 K. B. 805.

of the insured's estate, or become subject to his or her debts.

Under the Life Assurance Companies (Payment into Court) Act, 1896, an insurance company can pay policy moneys into court, "if in the opinion of the board of directors no sufficient discharge can otherwise be obtained" (a).

With regard to insurance generally, it should be borne in mind that misrepresentation of fact, on the part of the insured (whether made by himself or by his agent without his knowledge), upon a point material for the insurer's guidance in estimating the risk, will, as in the case of other contracts, discharge the latter from his liability; and this is so, whether the loss which actually happens has any connection with the matter misrepresented or not (b). And, since insurance contracts are contracts *uberrimæ fidei*, mere concealment of any circumstance of the like description also vitiates the policy, if such circumstance was known to the insured at the time of effecting the policy (c).

Finally, it may be observed, that where a policy is void *ab initio*, or where the insurer elects to avoid a policy, from a cause not amounting to fraud or illegality on the part of the insured—as where, in a marine insurance, the ship, though believed to be seaworthy, turns out not to have been so, contrary to the implied warranty on that subject, or sails alone, contrary to an express warranty to sail with convoy, or where, in a policy of life assurance, the declaration upon the basis of which the policy is made is incorrect but not designedly untrue (d)—the insurer is bound, in every

(a) *Harrison v. Alliance Assurance Co.* [1903] 1 K. B. 184.

(b) *Blackburn v. Vigors* (1887) L. R. 12 App. Ca. 531; *Blackburn v. Haslam* (1888) 21 Q. B. D. 144.

(c) See *ante*, pp. 133–134;

*London Assurance v. Mansel* (1879) 11 Ch. D. 367; *Seaton v. Burnand* [1900] A. C. 135.

(d) *Fowkes v. Manchester and London Assurance Association* (1863) 3 B. & S. 917; *Hemmings v. Sceptre Life*



such case, to refund the premium; for he was never legally in risk, and therefore cannot retain the consideration (a). And where the policy is voidable by the insured on account of the fraud of the insurer or his agent, the insured is entitled to recover the premiums (b). But where, on the other hand, a policy is void *ab initio* for illegality, or is voidable for the fraud of the insured, the insured cannot reclaim even the premium; the mutuality of the fault making no difference. For in this latter class of cases the maxim applies: *in pari delicto, potior est conditio possidentis* (c).

*Association* [1905] 1 Ch. 365.  
(But see and contrast *Sparenberg v. Edinburgh Life Assurance Co.* [1912] 1 K. B. 195.)

(a) *Tyrie v. Fletcher* (1777) 2 Cowp. 666.

(b) *Molloy v. Mutual Reserve Co.* (1906) 94 L. T. 756; *Refuge Assurance Co. v. Kettlewell* [1909] A. C. 243.

(c) *Chapman v. Fraser* (1793) Marsh. 525; *Marck v. Abel* (1802) 3 Bos. & P. 35; *Harse v. Pearl Life Assurance Co.* [1904] 1 K. B. 558; *Evanson v. Crookes* (1912) 106 L. T. 264; *Elson v. Crookes* (1912) 106 L. T. 462; *Howarth v. Pioneer Life Assurance Co.* (1912) 107 L. T. 155.

## CHAPTER V.—SECTION XI.

## OF BILLS OF LADING AND CHARTERPARTIES.

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CHARTERPARTIES are instruments in writing (with or without seal), between a merchant and a ship-owner, for the hire of an entire vessel at a freight or reward agreed on, either for a particular voyage or voyages or for a specified period of time. Upon the execution of such an instrument, the ship is said to be 'chartered' or 'freighted,' and the party by whom she is engaged is called the 'charterer' or 'freighter.' But where, instead of taking the entire vessel, the owner of goods merely bargains for their conveyance, for freight, by any particular vessel (other goods being at the same time conveyed in her for other owners), she is described, not as a chartered but as a *general* ship; and, in this latter case, no charterparty is usually executed, but only a bill of lading. The ship-owner in the latter case is merely a carrier, and, in the absence of agreement to the contrary, is subject to the ordinary law of carriers; except so far as his duties and liabilities are regulated by the Merchant Shipping Act, 1894, and other statutes (a).

A *bill of lading* fulfils three functions in law. (1) It is an acknowledgment of or receipt for the goods shipped under it (b); (2) it constitutes the contract for carriage of the goods, and sets forth the terms and conditions by which the parties to that contract are

(a) See *ante*, p. 183.

*Zealand Co.* [1901] 1 K. B.

(b) Bills of Lading Act, 548.

1855, s. 3; *Parsons v. New*

bound (a); and (3) it is a document of title to the goods, so that indorsement and delivery of it to a purchaser operate to transfer to him the ownership in the goods, as well as the contractual rights and liabilities in respect of them (b).

A *charterparty* is commonly made between the owner or the master of the ship on the one part, and a merchant or owner of goods on the other; and purports to be an agreement, that the ship shall be employed in the conveyance of goods for a certain voyage, or for a certain period of time, at a certain amount of freight, calculated at so much per ton, or at so much per month during the voyage. It also usually engages: first, on the part of the ship-owner or master, that, being staunch, sound, and fitted for the voyage, the ship shall receive a full cargo on board, not exceeding what she can reasonably carry (c); that the ship shall forthwith sail (wind and weather permitting) on the specified voyage; and that the cargo shall be delivered (subject to certain preventing causes) at the port of destination, to the charterer or his assignees, in as good order as it was received on board; and second, on the part of the charterer, that he will supply a full cargo, and load and unload the goods within a certain number of days (usually called 'lay' days), and pay freight, as agreed upon; and that, if he detains the vessel beyond the running days, he will also pay *demurrage*, that is, a certain amount *per diem* for a specified period while the ship is detained (d). After the expiry of such period, he will, independently of

(a) Bills of Lading Act, 1855, as interpreted by *Leduc v. Ward* (1888) 20 Q. B. D. 479.

(b) *Ante*, p. 164; *Sewell v. Burdick* (1885) L. R. 10 App. Ca. 79; Bills of Lading Act, 1855, s. 1.

(c) Cf. *Jardine v. Clyde Shipping Co.* [1910] 1 K. B. 627.

(d) *Saxon Steamship Co. v. Union Steamship Co.* (1901) 83 L. T. 106; *Hulthen v. Stewart* [1903] A. C. 389; *Larsen v. Sylvester* [1908]

express agreement, be liable to pay damages for the detention.

In the performance of this contract, it is the duty of the ship-owner or master to take good care of the cargo during the voyage ; and the ship-owner will be liable to make satisfaction for any damage resulting from the master's negligence in this respect, or for the loss or non-delivery of any of the goods of which the cargo consists, unless occasioned by causes within the exceptions of the charterparty. Under the ordinary exceptions, the ship-owner, if he has acted with reasonable care, is protected from liability for loss or delay arising from " the act of God, the King's " enemies, restraint of princes and rulers, fire," and perils of the sea of all kinds (a). By the Act of Congress of the United States known as the ' Harter Act,' the ship-owner, not being personally guilty of negligence, is exempted from responsibility for damage or loss resulting from faults or errors in the management of the ship ; and the provisions of this Act are not infrequently incorporated in charterparties of ships sailing between foreign and English ports. But the incorporation of these provisions does not exclude or cut down the ship-owner's implied warranties that the ship is fit for the reception and carriage of the cargo (b). If the goods arrive safely, the ship-owner or master is not bound to deliver them, unless there be some stipulation to that effect, except against payment of the freight (c) ; for there is in general a lien on the goods for the freight, and the delivery and payment are considered in law as concurrent obligations.

A. C. 295 ; *Thorman v. Downgate Steamship Co.* [1910] 1 K. B. 410.

(a) *The Xantho* (1887) L. R. 12 App. Ca. 510 ; *The Northumbria* [1906] P. 292.

(b) *Rowson v. Atlantic*

*Transport Co.* [1903] 2 K. B. 666 ; *McFadden v. Blue Star Line* [1905] 1 K. B. 697.

(c) *Dennis & Sons v. Cork Steamship Co.* (1913) 29 T. L. R. 489.

For this reason, if the cargo is not carried to its destination, even though the ship-owner or master is prevented from completing the voyage by accident for which he is not responsible, and the owner of the cargo ultimately gets the benefit, there is no implied claim *pro rata* for the incomplete voyage (*a*). But where the ship was chartered for a lump sum as freight, and was wrecked outside the port of discharge, and part of the goods were washed ashore and collected by order of the master and deposited on the dock premises, it was held that the ship-owner had performed his contract, since the delivery of the rest of the cargo was excused by the exception of perils of the sea; and he was held entitled to the whole freight (*b*). But if the master abandons the ship, and it is brought in by salvors (*c*), or if the master is compelled to sell part of the cargo at an intermediate port for necessary repairs, though it is sold for more than it would fetch if carried to its destination (*d*), or if it is sold at a port of distress, as being too much damaged for re-shipment (*e*), no freight is payable. But where the owner of the goods voluntarily accepts them at an intermediate port, and dispenses with the further carriage, he may be held liable to pay the freight *pro rata itineris* (*f*).

(*a*) *Smith v. Wilson* (1808) 8 East, 437.

(*b*) *Harrowing Steamship Co. v. Thomas* [1912] 3 K. B. 321.

(*c*) *The Kathleen* (1874) 43 L. J. Ad. 39; L. R. 4 A. & E. 269.

(*d*) *Hopper v. Burness* (1876) L. R. 1 C. P. D. 137.

(*e*) *The Industrie* [1894] P. 58.

(*f*) *The Soblomsten* (1866) L. R. 1 A. & E. 297; *Metcalf v. Britannia Iron Works* (1877) 2 Q. B. D. 423.

## CHAPTER V.—SECTION XII.

## OF DEBTS AND CHOSSES IN ACTION GENERALLY.

PRACTICALLY speaking, every contract gives rise to a *chose in action* ; of the nature of which something has been previously said. It is, therefore, fitting that some general rules about *choses in action*, and especially as to their assignability, should be stated at the close of this long chapter on the law of contract.

For, although, in its original sense, a *chose in action* meant merely any right to things personal out of one's possession, in modern times the expression is, ordinarily, extended to rights to any act or forbearance due under a contract, and in particular is commonly applied to the right to receive payment of money (a). The most familiar instances of *choses in action* are, therefore, ordinary debts, stocks and shares in companies, and negotiable instruments. It is not necessary in this part of the work to deal specially with the subject of stocks and shares ; but it is proposed to consider the other instances mentioned in some detail.

Debts and other *choses in action* were not at common law assignable. If a person assigned a *chose in action* to another, the latter could not in his own name sue the debtor. An assignment could only be made by

(a) As to the meaning of the term *chose in action*, see *Torkington v. Magee* [1902] 2 K. B. 427, [1903] 1 K. B. 644. The benefit of a covenant to buy beer from the lessor only is (*semble*) a *chose in action* (*Manchester Brewery Co. v. Coombs* [1901] 2 Ch. 603). So is a reversionary interest in settled chattels (*Re Thynne* [1911] 1 Ch. 282.)

consent of the debtor ; so as in effect to amount to a novation of the debt. The obligation between debtor and creditor was regarded as a personal one ; and, in addition to this fact, a *chose in action*, being an intangible thing, had only a notional existence, and it was regarded as impossible to transfer possession of it, and therefore impossible to assign it effectually at all (a). From this technical rule of the common law there were a few exceptions, *i.e.*, (1) the Crown could assign its *choses in action* ; (2) assignments by operation of law were valid, *e.g.*, on marriage, death, or bankruptcy ; (3) annuities were assignable (b) ; (4) by the law merchant, which was in effect part of the common law, bills of exchange, cheques, and exchequer bills to bearer, could be assigned.

Further exceptions in particular cases grew up by statute ; for instance, promissory notes by Acts of Queen Anne's reign, bail bonds, replevin bonds, mortgage bonds, bills of lading (if indorsed), mortgage debentures, East India bonds, policies of life and marine insurance, and shares in companies.

Moreover, quite apart from statute altogether, many *choses in action* could, and can still, be assigned in equity (c). The Court of Chancery, from a very early date, would recognise as valid, and give effect to, such an assignment. An equitable assignment of an existing *chose in action* need not be for value (d) ; though an assignment of a future *chose in action* can, obviously, only operate as a contract to assign when such *chose*

(a) *Lampet's Case* (1613) 10 Rep. 48 a ; *Master v. Miller* (1791) 4 T. R. 340.

(b) Co. Litt. 144 b. Note 1 by Hargrave.

(c) *William Brandt's Sons & Co. v. Dunlop Rubber Co.* [1905] A. C. 454 ; *Alexander v. Steinhart, Walker &*

*Co.* [1903] 2 K. B. 208.

(d) *Harding v. Harding* (1886) 17 Q. B. D. 442 ; *Re Patrick* [1891] 1 Ch. 82 ; *Re Griffin* [1899] 1 Ch. 408 ; *Re Fitzgerald* [1904] 1 Ch. at p. 591, *per* COZENS-HARDY, L.J.

*in action* comes into existence, and, as such, requires a valuable consideration, even though it is under seal (a). But notice of the assignment must be given to the debtor, in order to render it effectual *against him* and as against subsequent assignees (b). And the assignee obtains no better title than the assignor, but takes the *choses in action* subject to any equitable rights of other persons affecting it at the time of the assignment, whether he had notice of such rights or not; unless there exists some estoppel precluding such persons from setting up equities (c).

The effect of an equitable assignment varies according to the nature of the *chose in action* assigned. If it is an *equitable chose in action* (i.e., a claim which is only enforceable on equitable grounds), the assignee can sue in his own name without making the assignor a party, so as effectually to bind the latter; if it was a legal *chose in action*, then before the passing of the Judicature Act, it was necessary, when an action was to be brought in a court of common law, that the action should be brought in the name of the assignor, and the Court of Chancery would order him to allow such proceedings to be brought in his name. Under the present practice, if the assignor refuses to join as plaintiff with the assignee, he is joined as defendant, in order to bind him by the decree or judgment. To facilitate matters, the assignor would sometimes appoint the assignee his attorney, to sue for the debt in the name of the assignor.

There are certain exceptional cases in which a *chose in action* can neither in equity nor under the

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| <p>(a) <i>Tailby v. Official Receiver</i> (1888) L. R. 13 App. Ca. 523; <i>Re Ellenborough</i> [1903] 1 Ch. 697; <i>Glegg v. Bromley</i> [1912] 3 K. B. 474.</p> <p>(b) <i>Re Patrick</i>, <i>ubi sup.</i>, at pp. 82, 87; <i>Ward v. Dun-</i></p> | <p><i>combe</i> [1893] A. C. 369; <i>Bence v. Shearman</i> [1898] 2 Ch. 582.</p> <p>(c) <i>Ord v. White</i> (1840) 3 Beav. 357; <i>Hooper v. Smart</i> (1875) 1 Ch. D. 90; <i>Re Goy &amp; Co.</i> [1900] 2 Ch. 149.</p> |
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Judicature Act be effectually assigned, *i.e.*, (1) where it arises out of a contract which is purely personal (*a*) : (2) where it contains an express provision against assignment ; and (3) where the assignment is illegal or contrary to public policy. Thus a mere right to sue for damages for a wrongful act cannot be assigned ; nor (*semble*) a right to sue for unliquidated damages for breach of contract (*b*).

But, as regards *choses in action* generally, a great change in the law was made by the Judicature Act, 1873 (*c*) ; which provides, in effect, that any absolute assignment in writing of any debt or other ‘ legal ’ *chose in action*, of which express notice in writing shall have been given to the debtor, shall vest in the assignee the *legal* right to sue for and give a good discharge for the same, without the concurrence of the assignor, but subject to all prior equities. The effect of this provision is to give the assignee a complete legal right to sue in his own name (*d*).

The conditions upon which the section operates are as follows : (1) The assignment must be “ absolute and “ not by way of charge only.” But a mortgage in the ordinary form is an absolute assignment (*e*). An assignment of an indefinite part of a debt is not an absolute assignment ; and it seems to be the better opinion, that there cannot be an absolute assignment even of a definite part of a debt (*f*). (2) The assignment

(*a*) Fry, *Specific Performance*, 3rd edition, ss. 224–233 ; *Griffith v. Tower Co.* [1897] 1 Ch. 21 ; *Kemp v. Baerselman* [1906] 2 K. B. 604.

(*b*) *May v. Lane* (1894) 64 L. J. Q. B. 236 ; *Dawson v. Great Northern & City Ry. Co.* [1905] 1 K. B. 260. But see *King v. Victoria Insurance Co.* [1896] A. C. 250 ; *Weinberg*

*v. Ogdens* (1905) 22 T. L. R. 58.

(*c*) 36 & 37 Vict. c. 66, s. 25 (6).

(*d*) *Read v. Brown* (1888) 22 Q. B. D. 132.

(*e*) *Durham v. Robertson* [1898] 1 Q. B. 765 ; *Re Kelcey* [1899] 2 Ch. 530 ; *Hughes v. Pump House Co.* [1902] 2 K. B. 190.

(*f*) *Jones v. Humphreys*

must be of a “debt or legal *choses in action*.” This seems to include all rights which could, previously to the Act, have been validly assigned either at law or in equity. It would not, however, include the exceptional cases above mentioned; such as a mere right to sue for unliquidated damages for breach of contract, or a purely personal contract (*a*). (3) The assignment need not necessarily be for value (*b*). (4) The assignment must be “in writing under the hand of the “assignor.” (5) Express notice in writing must be given to the debtor (*c*). In equity notice in any form was sufficient. (6) The assignee, whether for value or not, takes subject to all equities subsisting against the assignor; whether he (the assignee) has notice of them or not (*d*).

It may be added that, even since the passing of the Judicature Act, if an assignment for some reason does not come within the scope of the section, it may, nevertheless, still be enforceable as an *equitable* assignment; subject to the conditions applicable in such a case (*e*).

*Negotiable Instruments*.—We have previously dealt,

[1902] 1 K. B. 10; *Forster v. Baker* [1910] 2 K. B. 636. In *Skipper v. Holloway* [1910] 2 K. B. 630, the action was so constituted that an equitable assignment would have been enough for the plaintiff's purpose. The decision was reversed on the ground that there was in fact no debt in existence [1910] W. N. 74. (And see *Conlan and Coyle v. Carlow County Council* [1912] 2 I. R. 535.)

(*a*) *May v. Lane* (1894) 64 L. J. Q. B. 237; *Torkington v. Magee* [1902] 2 K. B. at p. 433; *Kemp v. Baerselman*

[1906] 2 K. B. 604; *Defries v. Milne* [1913] 1 Ch. 98.

(*b*) *Harding v. Harding* (1886) 17 Q. B. D. 442.

(*c*) *Dibb v. Walker* [1893] 2 Ch. 429; *Marchant v. Morton* [1901] 2 K. B. 829; *Denney v. Conklin* [1913] W. N. 191.

(*d*) *Re Jones* [1897] 2 Ch. 203; *Re Griffin* [1899] 1 Ch. 408.

(*e*) *Palmer v. Culverwell* (1902) 85 L. T. 758; *William Brandt's Sons & Co. v. Dunlop Rubber Co.* [1905] A. C. 454; *Alexander v. Steinhart, Walker & Co.* [1903] 2 K. B. 208.

in some detail (a), in speaking of bills of exchange and promissory notes, with the peculiar qualities annexed to them as negotiable instruments ; and it is not necessary to repeat these statements. But it is material here to observe that the instruments dealt with in the Bills of Exchange Act, 1882, are not the only documents which enjoy the character of negotiability (b).

For negotiable instruments can arise in one of two ways, *i.e.*, by statute, or by custom of merchants: It would appear, moreover, that such custom need not be ancient ; so long as it has in fact by usage become well established (c). Express agreement is not sufficient to make an instrument 'negotiable' ; though it may give rise to an estoppel which would prevent the party issuing it, and liable under it, from disputing the title of a *bonâ fide* holder for value (d).

There are many instruments which by mercantile custom have now become recognised as 'negotiable,' *e.g.*, Treasury bills in blank ; India bonds ; foreign or colonial government scrip ; bonds and stock payable to bearer ; share warrants of a limited company (probably) ; certain railway bonds to bearer ; cedula bonds ; and bankers' circular drafts (e). Debentures issued by a company may, it would also appear, become negotiable by custom (f).

*Particular kinds of debts.*—It is desirable, before concluding this section, to consider certain special

(a) See *ante*, pp. 222–224.

(b) See generally, *London Joint Stock Bank v. Simmons*, [1892] A. C. 201.

(c) *Crouch v. Crédit Foncier* (1873) L. R. 8 Q. B. 381 ; *Goodwin v. Roberts* (1875) L. R. 1 App. Ca. 476 ; *Edelstein v. Schuler* [1902] 2 K. B. 144.

(d) *Goodwin v. Roberts*,

*supra* ; *Balkis Co. v. Tomkinson* [1893] A. C. 396.

(e) See Willis, *Negotiable Securities* ; where complete lists are given.

(f) *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q. B. 658 ; *Edelstein v. Schuler* [1902] 2 K. B. 144.

classes of debts. In general, whenever a contract is such as to give one of the parties a right to receive a liquidated sum of money from the other—as in the case of a bond for payment for money, or an implied promise to pay for goods supplied so much as they shall be reasonably worth—a debt is said to exist between these parties. But if the demand be of an uncertain amount, as where an action is brought against a bailee, for injury done, through his negligence, to the article committed to his care, or where there is a breach of a contract to lend money, it is described, not as a debt, but as a claim for damages (*a*). As debts may thus arise out of contracts, and the contracts may be either specialty contracts or simple contracts, so the debts resulting therefrom are denominated either *specialty* debts or *simple contract* debts.

Debts may arise, however, not only by deed or simple contract, but also by *matter of record* ; and in that case, they receive the designation of *debts of record*, and include judgment debts, debts due upon a statute merchant or statute staple (now obsolete), and recognisances. Recognisances are obligations entered into before some Court or magistrate duly authorised ; whereby the party bound acknowledges that he owes to the Crown or (as the case may be) to a private plaintiff, a certain sum of money, with condition to be void if he shall do some particular act, *e.g.*, if he shall appear at the assizes, keep the peace, pay a certain debt, or the like (*b*). Recognisances, when forfeited, are said to be *estreated* ; that is, extracted or taken out from among the other records. Usually they are sent up to the Exchequer, to be enforced ; but if ordered to be estreated by a court of quarter sessions or of gaol delivery, then they are levied by the sheriff,

(*a*) *Western Waggon Co. v. Wallington* [1898] A. C. 309.  
*West* [1892] 1 Ch. 277 ; *South African Territories, Ltd. v. Bro. Ab. tit. Recognizance*, 24.

and returned by the clerk of the peace to the Lords of the Treasury.

Judgment debts are the most usual species of debts of record. When any sum is, in an action in any court of record, adjudged to be due from one party to the other, whether that sum was originally liquidated so as to constitute a debt between them, or was fixed and ascertained for the first time by the verdict of the jury or by the assessment of the Judge himself, it is said to be a judgment debt, and a debt of record.

Debts may also result otherwise than from contracts and judgment. For if, by Act of Parliament, a penalty is annexed to some particular offence, and is made recoverable by the informer, any person committing the offence becomes indebted in the amount of the penalty to the informer, so soon as the information is laid (a). Again, a man who has never contracted at all to pay a rent-charge issuing out of land, may become liable therefor as for a debt; by reason of his having taken and enjoyed the land out of which the rent-charge issues (b).

<p>(a) <i>Goldsmiths' Co. v. Wyatt</i> [1907] 1 K. B. 95; <i>Forbes v. Samuel</i> [1913] W. N. 163; <i>Forbes v. Samuel</i> (No. 2) [1913] 3 K. B. 706.</p>	<p>(b) <i>Thomas v. Sylvester</i> (1873) L. R. 8 Q. B. 368; <i>Searle v. Cooke</i> (1890) 43 Ch. D. 519.</p>
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## CHAPTER VI.

## OF TITLE BY BANKRUPTCY.

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THE property of a bankrupt is, by the statute law, divested out of him and vested in the bankruptcy trustee, for distribution by the latter among the general creditors of the bankrupt. The title of the trustee and (through him) of the creditors of the bankrupt, is consequently *by bankruptcy* ; and it extends not merely to the personal estate, but also to the real estate, of the debtor.

The foundation of the law of bankruptcy in this country is the statute 34 & 35 Hen. 8 (1542) c. 4, which described bankrupts as those “ who obtain other “ men’s goods and then suddenly flee to parts unknown, “ or keep their houses and there consume their substance, “ without paying their debts.” And the Act (as subsequently amended by the 13 Eliz. (1571) c. 7), provided that, upon complaint in writing to the Lord Chancellor, not only the property but also the person of the debtor, should be made available for the payment of all his creditors rateably, according to their debts. By both these Acts, as will have been observed, the bankrupt was, in a sense, regarded as a criminal ; and he met with no favour at the hands of the legislature. At length, however, it came to be considered harsh to strip a man of all his resources, and at the same time not to relieve him from his difficulties ; and it was accordingly provided, by the 4 & 5 Anne (1705) c. 4, in imitation probably of the Roman law of *cessio (a)*, that a bank-

(a) Cod. 7, 71 ; Inst. 4, 6, 40.

rupt trader, who had been compelled to surrender the whole of his effects, and had in all matters conformed to the law of bankruptcy, should be entitled to his discharge from all further liability for his debts theretofore contracted.

By divers subsequent statutes, further provisions were enacted—applicable some of them to traders, and others of them to non-traders—for bringing debtors within the law relating to bankrupts ; and further, any debtor (whether a trader or not), was enabled, under these later statutes, to institute voluntary proceedings against himself, with the view of becoming a bankrupt, and so of obtaining a discharge from his debts and liabilities. The administration of the law of bankruptcy (which had originally been entrusted to commissioners appointed by the Lord Chancellor, and acting for each case separately) came at length to be assigned, for all bankruptcies arising within the metropolitan area, to a particular court called the Court of Bankruptcy ; and, for all bankruptcies arising outside of that area, to district bankruptcy courts, which latter courts are now represented by such of the County Courts as have jurisdiction in bankruptcy.

The statutes of Henry, Elizabeth, and Anne above referred to, and some subsequent Acts on the same subject, were repealed by the 6 Geo. 4 (1825) c. 16, whereby a new system was established for bankruptcy administrations. But this new system, after continuing in force for a considerable time, was itself afterwards abandoned ; and in the course of the reign of Victoria, successive attempts were made to provide a satisfactory system for the administration of bankrupt estates (*a*). The existing system is that which has been provided by the Bankruptcy Act, 1883, the

(*a*) 12 & 13 Vict. c. 106 (the Bankruptcy Act, 1849) ; 24 & 25 Vict. c. 134 (the Bankruptcy Act, 1861) ; and 32 & 33 Vict. c. 71 (the Bankruptcy Act, 1869).

Bankruptcy (Discharge and Closure) Act, 1887, the Bankruptcy Act, 1890, and the Bankruptcy and Deeds of Arrangement Act, 1913, and the Rules made thereunder ; which system is, in all its branches, subject to the control of the Board of Trade, a comparatively new feature in our bankruptcy law. The tribunals having jurisdiction in bankruptcy are now the High Court of Justice, to which the jurisdiction of the London Court of Bankruptcy was transferred by the Act of 1883, and such of the County Courts as are not excluded from bankruptcy jurisdiction by order of the Lord Chancellor (*a*). Upon every Court having jurisdiction in bankruptcy as now established, there has been conferred a general power of deciding all questions of priorities, and all questions whatsoever, whether of law or of fact, which may arise in any case of bankruptcy, and which it may be deemed by that Court necessary or expedient to decide, for the purpose of doing complete justice, or of making a complete distribution of the property of the bankrupt. In the execution of its powers, a Court having jurisdiction in bankruptcy under the Act, is not liable to be restrained by the order of any other Court (*b*).

In proceeding to consider the existing law of bankruptcy, we shall first of all consider, who is capable of being made a bankrupt ; second, under what circumstances and in what manner he is adjudicated bankrupt ; third, the proceedings in the bankruptcy generally, subsequently to adjudication, or subsequently to the receiving order (which in general precedes the adjudi-

(*a*) Act of 1883, ss. 29, 93. (By order of the Lord Chancellor, dated 1st Jan., 1884, the jurisdiction in bankruptcy of the High Court is assigned to the King's Bench Division. Mr. Justice Horridge is the present Judge in Bankruptcy.)

(*b*) Act of 1883, s. 102, re-enacting a similar provision in the Act of 1869, s. 72 ; *Ex parte Dickin, Re Pollard* (1878) 8 Ch. D. 377 ; and *Re Lowenthal* (1884) 13 Q. B. D. 238.



cation); fourth, the effect of the bankruptcy on his estate; fifth, the bankrupt's discharge, and sixth, certain criminal offences connected with bankruptcy. And we shall conclude by giving some account of the compositions or schemes of arrangement into which debtors not infrequently enter, and which, although they formed no part originally of the law of bankruptcy, are now become closely connected with it.

I. *Who is capable of being made a bankrupt.*—This is a predicament which has been, and still is, applicable to none but *debtors*; and the term 'debtor' has the same sense in bankruptcy as under the general law, and imports a party bound (at law or in equity) to pay another a certain liquidated sum of money. But we must bear in mind, that although a judgment debtor is a 'debtor,' not every judgment or order of the Court for the payment of money makes a man a 'debtor' for the purposes of the Bankruptcy Acts (*a*).

Under the older bankruptcy laws, traders alone could be brought within the jurisdiction; and this distinction gave rise to many disputes as to what constituted a person a trader for the purposes of the statutes. But, for the most part, the distinction between traders and non-traders has ceased to apply; and, except in one case, non-traders are equally liable with traders to be made bankrupt. This exception is the case of the married woman, who, though not, as a rule, within the scope of the bankrupt laws, may, by the Bankruptcy Act, 1913 (*b*), if she carries on trade or business, whether separately from her husband or not, be made bankrupt, and is subject to the bankruptcy laws as if she was a feme sole (*c*); and the

(*a*) *In re Sacker, Ex parte Sacker* (1888) 22 Q. B. D. 179, explaining *Ex parte Harris* (1876) 2 Ch. D. 423; *In re Clements* [1901] 1 K. B. 260; *In re Macoun* [1904] 2 K. B. 700; Act of 1890, s. 1.  
 (*b*) S. 12 (1).  
 (*c*) As to the older law, see *In re Gardiner* (1887) 20

bankruptcy may be based upon non-compliance with a bankruptcy notice (*a*). An infant cannot, in the ordinary way, even though engaged in trade, be made bankrupt; inasmuch as he cannot bind himself by ordinary contract (*b*). Whether he could be made bankrupt in respect of debts for necessities, or for liabilities in torts, seems never to have been decided. He cannot, however, be made bankrupt upon a judgment founded on a bill of exchange given in payment for necessities (*c*).

Persons who (as being either peers or members of Parliament) used to have certain privileges or protection from civil process, are no longer protected from the liability to be made bankrupts. On the contrary, bankruptcy has the effect of disqualifying the bankrupt from sitting or voting in either House of Parliament, or from holding various public offices, including membership of a county or borough council. Such disqualification does not continue for more than five years after the bankrupt has received his discharge, and may cease earlier by the annulment of the bankruptcy, or, in certain cases, by discharge (*d*). Aliens, denizens, and persons naturalized, are as amenable to the law of bankruptcy as natural-born subjects (*e*). But in order to be capable of being made a bankrupt, the debtor must be domiciled in England, or (within a

Q. B. D. 249; *In re Lynes* [1893] 2 Q. B. 113; *In re Worsley* [1901] 1 K. B. 309.

(*a*) Act of 1913, s. 12 (2). As to the older law, see *Re Frances Handford & Co.* [1899] 1 Q. B. 566.

(*b*) *Ex parte Jones* (1881) 18 Ch. D. 109, overruling *Ex parte Lynch* (1876) 2 Ch. D. 227; *Lovell v. Beauchamp* [1894] A. C. 607.

(*c*) *In re Soltykoff* [1891]

1 Q. B. 413.

(*d*) Act of 1883, s. 124, ss. 32–34 (see 34 & 35 Vict. (1871) c. 50, ss. 6–8, now repealed); Act of 1890, s. 9; *Duke of Newcastle v. Morris* (1870) L. R. 4 H. L. 661; *In re Russell* (1872) L. R. 7 Ch. App. 519.

(*e*) *Allen v. Cannon* (1821) 4 B. & Ald. 418; Act of 1913, s. 8.

year before the date of the presentation of the petition) have ordinarily resided or had a dwelling-house or place of business in England (a); or, except in the case of a person domiciled in Scotland or Ireland, or a firm or partnership having its principal place of business in Scotland or Ireland, he must within the same period have carried on business in England personally or by means of an agent or manager, or have been a member of a firm or partnership carrying on business in England, by means of a partner or partners or an agent or manager (b).

II. *Under what circumstances, and in what manner, a debtor may be made a bankrupt.*—Bankruptcy proceedings may be taken either by a creditor or creditors, or by the debtor himself; the first step in each case being the filing of a petition praying for a receiving order (c). But, in the case of a creditor's petition, it is essential that the debtor shall have committed, within three months prior to the presentation of the petition, one or more of the following eight *acts of bankruptcy* (d), viz.: (1) in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally (e); (2) in England or elsewhere, made a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof; (3) in England or elsewhere, made any conveyance or transfer of his property, or any part thereof, or created any charge thereon, which would, under the Bankruptcy Act, 1883, or any other Act, be void as a fraudulent preference if he were adjudged bankrupt;

(a) Act of 1883, s. 6 (1) (d);  
*Ex parte Cunningham* (1884)  
13 Q. B. D. 418; *Cooke v.*  
*Vogeler & Co.* [1901] A. C.  
102; *In re Bright* [1903] W. N.  
17.

(b) Act of 1913, s. 9.

(c) Forms in Appendix to  
General Rules, 1886; No. 4,  
Debtor's Petition; No. 10,  
Creditor's Petition.

(d) Act of 1883, s. 4.

(e) *Ex parte Barton* [1900]  
2 Q. B. 329.

(4) with intent to defeat or delay his creditors, done any of the following things, viz., departed out of England, or, being out of England, remained out of England; or departed from his dwelling-house, or otherwise absented himself; or begun to keep house (a); (5) suffered execution against himself to be levied by seizure of his goods, under process in an action in any court or in any civil proceeding in the High Court, and the goods to be either sold or held by the sheriff for twenty-one days (b); (6) filed in the court a declaration admitting his inability to pay his debts, or presented a bankruptcy petition against himself (c); (7) had served in England (or, by leave of the Court, elsewhere) a bankruptcy notice under the Act, requiring him to pay (d) a judgment debt in accordance with the terms of the judgment (e), or to secure or compound for it to the satisfaction of the creditor or of the Court, and failed—within seven days after service of the notice, in case the service is effected in England, and, in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service—either to comply with the requirements of the notice (f), or to satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in

(a) *Ex parte Meyer, In re Stephany* (1871) L. R. 7 Ch. App. 188; *Ex parte Coates, In re Skelton* (1877) 5 Ch. D. 979.

(b) Act of 1890, s. 1, repealing s. 4 (1) (e) of the Act of 1883.

(c) *Ex parte Duignan, In re Bissell* (1872) L. R. 6 Ch. App. 605.

(d) The notice may specify an agent to act on behalf of the creditor in respect of any

payment or other thing required to be done (Act of 1913, s. 16 (2) (i.)).

(e) Including final orders and sums ordered to be paid (Act of 1913, s. 16 (1)).

(f) The Act of 1913, s. 16 (2) (ii.), provides against a notice being invalidated by reason of the sum specified in the notice exceeding the amount actually due.

which the judgment was obtained ; or (8) given notice to any of his creditors that he has suspended, or is about to suspend, payment of his debts.

And here it is to be noted (as being in some sense a ninth act of bankruptcy), that, on an application under the Debtors Act, 1869, made by a judgment creditor for an order of committal against the judgment debtor, the Court may, in lieu of committing, make a receiving order against the debtor, provided the creditor consent thereto (a). In such a case, the debtor is deemed to have committed an act of bankruptcy at the time when such order is made (b).

As regards the first and second of the eight acts of bankruptcy, it should be observed, that the character of the transaction, as being innocent or fraudulent, is to be determined exclusively by its effects upon the creditors of the debtor. So that any transfer is fraudulent, which is void under the statute 13 Eliz. (1571) c. 5 ; or which substantially conveys the debtor's whole property in consideration of a pre-existing debt (c) ; or which conveys even a portion of his property in consideration of such a debt, if made voluntarily and in contemplation of bankruptcy, or if it otherwise has the effect of defeating or delaying the creditors (d).

Such being the different acts of bankruptcy, one of which must have been committed before a petition can be filed by a creditor, we may next notice that there must be a debt owing to the petitioning creditor amounting to 50*l.* or upwards ; but any two or more creditors whose debts in the aggregate amount to 50*l.* may be the petitioning creditor (e). The debt must

(a) Debtors Act, 1869, s. 5.

(b) Act of 1883, s. 103.

(c) *Worsley v. De Mattos* (1758) 1 Burr. 467 ; *Ex parte Ellis* (1876) 2 Ch. D. 797 ; *Ex parte Chaplin* (1884) 26 Ch. D. 319 ; *In re Jukes* [1902] 2

K. B. 58 ; *In re Slobodinsky* [1903] 2 K. B. 517.

(d) *Alton v. Harrison* (1869) L. R. 4 Ch. App. 622 ; *In re Lake* [1901] 1 K. B. 710.

(e) Act of 1883, s. 6 (1).

be a liquidated sum due either at law or in equity (*a*), and payable either immediately or at some certain future time ; and it must be an actionable debt (*b*). If the debt of the petitioner should be a secured debt, then the creditor must, in his petition, state that he is willing to give up his security for the benefit of the creditors in the event of an adjudication of bankruptcy ; or else he must give an estimate of the value of the security, and then he is deemed to be a petitioning creditor in respect only of the balance of his debt (*c*). The petition, which must be verified by affidavit (*d*), is to be filed either in the County Court (which has, for this purpose, all the jurisdiction of the High Court) or in the High Court (*e*), according to the following distinctions. If the debtor against or by whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any County Court, or if he is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition must be presented to the High Court. In any other case, the petition must be presented to the County Court having jurisdiction in bankruptcy for the district in which the debtor has resided or carried on business, for the longest period during the six months immediately preceding the presentation of the petition.

The petition, unless it is filed by the debtor himself, must be duly served on the debtor ; and, in order to prevent his avoiding such service, the debtor may, in a proper case, be arrested under the Bankruptcy Act,

(*a*) *Ex parte Blencowe* (1866) 309.

L. R. 1 Ch. App. 393.

(*c*) Act of 1883, s. 6 (2).

(*b*) *Ex parte Sturt, In re*  
*Pearcy* (1871) L. R. 13 Eq.

(*d*) *Ibid.* s. 7.

(*e*) *Ibid.* s. 95.

1883 (a), as amended by the Bankruptcy Act, 1890 (b). A debtor's petition must allege that the debtor is unable to pay his debts; and the presentation thereof is to be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the Court must thereupon make a receiving order. A debtor's petition cannot after presentment be withdrawn, without the leave of the Court (c).

At any time after the presentation of the petition, the Court may make an *interim* appointment of the official receiver as receiver of the debtor's property; and may stay any pending action or execution or other legal process (d).

Upon the hearing of the petition, unless it is dismissed, a receiving order will be made, and an official receiver will be thereby constituted receiver of the property of the debtor; and after such order no creditor having a provable debt may commence an action or other proceeding unless with the leave of the Court. But this does not affect the power of a secured creditor to realise or otherwise deal with his security (e). Notice of the receiving order is sent to the official receiver and to the Board of Trade, and is advertised. Such official receiver may appoint a special manager until a trustee is appointed (f).

Within seven days from the date of the receiving order made on the petition (if it is a creditor's petition), and within three days from that date (if the petition is that of the debtor himself), the debtor makes out and submits to the official receiver a statement of his affairs, showing the particulars of his assets and liabilities (g); and, as soon as conveniently may be

(a) S. 25.

(b) S. 7.

(c) *Ibid.* s. 8.

(d) Act of 1883, ss. 5, 9, 10;

5 Ch. App. 473.

(e) Act of 1883, s. 9.

(f) *Ibid.* s. 12.

(g) *Ibid.* s. 16.

*Ex parte Anderson* (1870) L. R.

after such receiving order has been made and advertised as already mentioned, the official receiver is to summon a general meeting (usually called the 'first meeting') of the creditors, of which seven days' notice is given in the *London Gazette*, and in a local paper (a). This notice is, in the general case, for a day not later than fourteen days from the date of such receiving order (b); and the official receiver sends to each of the creditors mentioned in the debtor's statement of affairs a summary of that statement (c).

At this meeting the creditors consider whether the debtor shall be made a bankrupt or not, or whether, supposing any composition be offered by the debtor, it shall be accepted or not—a subject which will be dealt with later (d). If they, at such first meeting, or at any adjournment thereof, by ordinary resolution, resolve that the debtor be adjudged bankrupt—or if they pass no resolution, or do not even meet—the Court adjudges the debtor a bankrupt; and thereupon the property of the bankrupt becomes divisible among his creditors, and for that purpose vests in a trustee (e). The adjudication order is then forthwith published in the *London Gazette*, and in such local papers as may be prescribed; and the production of a copy of the *Gazette*, containing a copy of the order, is made conclusive evidence of the debtor having been adjudged a bankrupt, and of the date of the adjudication (f). We may further observe here, that a debtor may also be adjudicated a bankrupt, either (1) for failing without reasonable excuse to submit to the official receiver his statement of affairs hereinbefore mentioned (g); or (2) for default in the payment of any instalment due in pursuance of any composition or scheme of arrangement

(a) Act of 1883, s. 15; First Schedule, R. 2.

(b) First Schedule, R. 1.

(c) *Ibid.* R. 3.

(d) See *post*, pp. 299–304.

(e) Act of 1883, s. 20.

(f) *Ibid.* ss. 20, 132.

(g) *Ibid.* s. 16 (3).



arrived at as hereinafter mentioned (a); or (3), as already mentioned, on the application of a judgment creditor for a committal order against the debtor (b).

III. *The proceedings subsequent to the adjudication or receiving order.*—Having now shown upon what grounds, and in what manner, a debtor is adjudicated bankrupt, we have next to advert more particularly to the proceedings which take place after such adjudication, or after the receiving order has been made, other than the matters relative to the realisation and distribution of the bankrupt's property by the trustee (which will be considered incidentally in treating of the effect of the bankruptcy on the debtor's property), and other than the bankrupt's discharge (which will be the last subject for consideration in an ordinary bankruptcy).

Where a debtor is adjudged bankrupt, or the creditors have resolved that he be adjudged bankrupt, they may appoint some fit person (whether a creditor or not) to fill the office of trustee of the bankrupt's property (c); and they may appoint from among the creditors, or the holders of general proxies or general powers of attorney from such creditors, fit persons, not more than five nor less than three in number, to form a 'committee of inspection,' for the purpose of superintending the administration of the bankrupt's property by the trustee (d). They may also appoint a person a member of the committee, subject to his becoming holder of such proxy or power (e). In case the creditors do not, within the time mentioned in the Act, usually four weeks from the adjudication, appoint a trustee, the Board of Trade appoints one until such time as the creditors shall have made the

(a) Act of 1883, s. 18 (11).

(d) *Ibid.* s. 22.

(b) *Ibid.* s. 103.

(e) Act of 1913, s. 17.

(c) *Ibid.* s. 21.

appointment; but the creditors may leave it to the committee of inspection to make the appointment (*a*). The first meeting is, as a general rule, presided over by the official receiver (or his nominee) (*b*), in whom the property of the bankrupt vests, from the date of adjudication until some other trustee is appointed (*c*).

Every creditor is required to prove his debt as soon as may be after the making of the receiving order, by an affidavit which is sent (prior to the appointment of the trustee), to the official receiver of the Court, and (after such appointment) to the trustee himself (*d*). And no person is entitled to vote as a creditor, either at the first or at any subsequent meeting, unless he has first duly proved his debt in the prescribed manner (*e*).

The trustee has to give security to the satisfaction of the Board of Trade; and his appointment only becomes effective upon, and as from the date of, the certificate of the Board of Trade (*f*), which is conclusive evidence of his appointment (*g*). The property of the bankrupt thereupon passes out of the official receiver and vests in the trustee (*h*); but the trustee remains subject to the control of the Board, which is rendered effective by strict provisions requiring the trustee to furnish periodical accounts (*i*), and statements of proceedings (*k*), and to pay all sums received by him on account of the estate, and not required for current purposes, immediately into the Bank of England, or, in certain cases, a local bank (*l*), on pain of removal by the Board of Trade. The trustee may also be

(*a*) Act of 1883, s. 21, subss. (6) and (7); *In re Finney* (1870) L. R. 6 Ch. App. 79.

(*b*) Act of 1883, First Schedule, R. 7.

(*c*) *Ibid.* s. 54.

(*d*) *Ibid.* Second Schedule, Rr. 1-4.

(*e*) *Ibid.* First Schedule,

R. 8.

(*f*) Act of 1883, s. 21 (4).

(*g*) *Ibid.* s. 138.

(*h*) *Ibid.* s. 54.

(*i*) *Ibid.* s. 78.

(*k*) *Ibid.* s. 81.

(*l*) *Ibid.* s. 74; Act of 1913, s. 20.

removed by the creditors by resolution ; and by the Board of Trade for misconduct or failure to perform his duties, or for incapacity due to lunacy, ill-health, or absence, or on the ground that his connection with or relation to the bankrupt or a creditor might make it difficult for him to act with impartiality, or in cases where in any other matter he has been removed from office for misconduct (*a*), or if the Board is of opinion that the trusteeship is being needlessly protracted without any probable advantage to the creditors (*b*).

The duty of the creditors' trustee is, generally, to exercise his best discretion in the management of the estate until the bankruptcy is closed, and until he has obtained his release (*c*). Until that event, the trustee may from time to time summon general meetings of the creditors, for the purpose of ascertaining their wishes ; he may also from time to time apply to the Court for directions, in relation to any particular matter arising in the bankruptcy ; and, as the bankruptcy proceeds, he consults with the committee of inspection as to his proceedings.

With a view to the full and due realisation by the trustee of the assets of the bankrupt, authority is specifically given to him, by the Bankruptcy Act, 1883, to exercise divers powers ; either on his own authority or with the sanction of the committee of inspection. Thus, he is empowered, of his own authority—(1) to sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt) by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels ; (2) to give receipts for

(*a*) Act of 1883, s. 86 ; Act of 1890, s. 19.

(*b*) Act of 1913, s. 19.

(*c*) Act of 1883, s. 82.

any money received by him, which receipts effectually discharge the person paying the money from all responsibility in respect of the application thereof; (3) to prove, rank, claim, and draw a dividend in respect of, any debt due to the bankrupt; (4) to exercise any powers the capacity to exercise which is vested in the trustee under the Act, and to execute any powers of attorney, deeds, and other instruments for the purpose of carrying into effect the provisions of the Act; (5) to deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have dealt with it, including the power to execute disentailing assurances under the Fines and Recoveries Act, 1833 (*a*).

Moreover, with the sanction of the committee of inspection, the trustee may—(1) carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same; (2) bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt; (3) employ a solicitor or other agent to take any proceedings or to do any business which may be sanctioned by the committee of inspection; (4) accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time, subject to such stipulations as to security and otherwise as the committee think fit; (5) mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts; (6) refer any dispute to arbitration, or compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist, between the bankrupt and any person who may have incurred any liability to the bankrupt, on the receipt of such sums, payable at such times, and generally

on such terms, as may be agreed on ; (7) make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable under the bankruptcy ; (8) make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person, or by the trustee on any person ; and (9) divide in its existing form among the creditors, according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot be readily or advantageously sold (*a*). The trustee may also (with the sanction of the committee) employ the bankrupt himself to superintend the management of his property ; and may make an allowance to him for his support, or in consideration of his services (*b*).

As soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs, the Court holds a public sitting for the examination of the debtor (called his *public examination*) (*c*) ; and of the date of such public sitting the official receiver gives notice by advertisement in the *London Gazette* and in a local paper. This public examination of the debtor is based upon the statement of his affairs ; and the official receiver, the trustee, and the Court, may put questions to the debtor, as likewise may any creditor who has tendered a proof of his debt ; and it is the duty of the debtor to answer all such questions. The debtor is of course bound, on the day appointed for his public examination, and on any adjournment of such examination, to attend the Court ; and, a note of his examination having been taken down in writing, such note is read over to or by,

(*a*) Act of 1883, s. 57.

(*b*) *Ibid.* s. 64.

(*c*) *Ibid.* s. 17.

and signed by, the debtor, and is afterwards open to the inspection of any of his creditors, and may be used in evidence against him. When the Court is satisfied that the affairs of the debtor have been sufficiently investigated, it makes an order declaring that the public examination is concluded. But such order will not be made until after the day appointed for the first meeting of the creditors (*a*).

The bankrupt, besides submitting his statement of affairs, and besides attending on his public examination and on any adjournment thereof, is required to attend the meetings of his creditors; to wait on the official receiver or trustee; to execute necessary powers and instruments; to furnish an inventory of his property; and, generally, to do everything in relation to his property and the distribution of its proceeds amongst his creditors, which may reasonably be required by the trustee, or which may be ordered by the Court (*b*).

The Court may, on the application of the official receiver or of the trustee, after the receiving order has been made, summon before it the bankrupt, or his wife, or any other person known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to him, or thought capable of giving information as to him, his dealings or property; and, in case of such person not appearing (having no lawful impediment allowed by the Court), the Court may direct him to be arrested and brought before it, and, on his appearing, voluntarily or otherwise, may examine him, either by word of mouth or by written interrogatories, concerning the bankrupt, his dealings or property (*c*).

(*a*) Act of 1883, s. 17; Act of 1890, s. 2; *In re Angerstein* (1872) L. R. 7 Ch. App. 662.

(*b*) Act of 1883, s. 24.

(*c*) *Ibid.*, s. 27; *Ex parte Reynolds* (1882) 20 Ch. D. 294.

IV. *The effect of the bankruptcy on the estate of the bankrupt.*—Upon the debtor being adjudicated bankrupt, the property of the bankrupt vests immediately, as we have said, in the official receiver, until a trustee is appointed (a). By force of his appointment, and subject to the exceptions which will presently be mentioned, the trustee takes, for the benefit of the creditors, all the lands, tenements, and hereditaments of the bankrupt, together with all his personal estate and effects, present and in expectancy, and wherever situate—in other words, all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or which (with the exceptions about to be noticed) may be acquired by or devolve on him before his discharge (b); and also all powers which he is entitled to exercise for his own benefit, except the right of nomination to any vacant ecclesiastical benefice (c). Moreover, in certain cases, the property even of strangers, if found in the bankrupt's possession, vests in the trustee. For it is one of the enactments of the bankrupt law, introduced to protect creditors from fraud and fallacious appearances, that where a bankrupt shall, at the commencement of the bankruptcy, have in his possession, order, or disposition, in his trade or business, by consent and permission of the true owner, any goods, under such circumstances that he (the bankrupt) is the reputed owner thereof, the goods shall be deemed to form part of the property of the bankrupt divisible amongst his creditors; *choses in action*, other than trade or business debts, being, however, expressly excluded from this order and disposition clause (d). It has

(a) Act of 1883, ss. 20, 54; R. 7 Ch. App. 185.)  
*In re Parker* (1885) 15 Q. B. D. 196. (c) Act of 1883, s. 44 (2) (ii.); *Badham v. Mee* (1831) 7 Bing. 695.  
 (b) Act of 1883, s. 44. (See *Ex parte Dewhurst* (1871) L. (d) Act of 1883, s. 44 (iii.);

already been observed (a), that goods and chattels comprised in a mortgage deed (as, *e.g.*, a duly registered bill of sale), in the order and disposition of the debtor, are not protected by the mortgage; the clause in the Bills of Sale Act, 1878, which prohibited this construction, having been repealed by the amending Act of 1882, so far as regards bills of sale given by way of security (b).

On the other hand, there passes not to the trustee any property which the bankrupt may earn purely by his personal labour or services, after the bankruptcy has commenced (c); nor his right of action for a personal wrong, *e.g.*, slander or even trespass, where the substantial claim is for personal annoyance (d); nor any property held by the bankrupt in the capacity of trustee for others (e); nor any appointment to an office which cannot legally be sold (f); nor the right to receive military or other pay from the Crown (g).

*Ex parte Union Bank of Manchester* (1871) L. R. 12 Eq. 354; *In re Silience* (1877) 7 Ch. D. 70; *In re Blanshard* (1878) 8 Ch. D. 601; *Ex parte Nottingham Bank* (1885) 15 Q. B. D. 441; *Colonial Bank v. Whinney* (1885) 30 Ch. D. 261; 11 App. Ca. 426.

(a) See *ante*, p. 82.

(b) 45 & 46 Vict. c. 43, s. 15; *Swift v. Pannell* (1883) 24 Ch. D. 210; *Re Ginger* [1897] 2 Q. B. 461.

(c) *Elliott v. Clayton* (1851) 16 Q. B. 581; *Emden v. Carte* (1881) 17 Ch. D. 768; *Ex parte Benwell* (1884) 14 Q. B. D. 301; *In re Rogers*, *Ex parte Collins* [1894] 1 Q. B. 425; *Bailey v. Thurston* [1903] 1 K. B. 137; *Affleck v. Hammond* [1912] 3 K. B. 162.

(d) *Rogers v. Spence* (1844)

13 M. & W. 571; *Ex parte Vine, In re Wilson* (1878) 8 Ch. D. 364; *Rose v. Buckett* [1901] 2 K. B. 449.

(e) Act of 1883, s. 44. So any property in the possession of the bankrupt as a mere collector or officer of a Friendly or other like Society must on demand be returned by the trustee in bankruptcy in preference to all other claims (Act of 1883, s. 40; *In re Miller* [1893] 1 Q. B. 327. And see Preferential Payments in Bankruptcy Act, 1888, s. 2 (i.); Friendly Societies Act, 1896, s. 35 (b)).

(f) *M'Bean v. Deane* (1885) 30 Ch. D. 520.

(g) *Gibson v. East India Company* (1839) 5 Bing. N. C. 262.



Nevertheless, the Court may, with the sanction of the chief officer of the department to which the bankrupt belongs or belonged, order portions of such pay to be applied in payment of his debts (a); and, subject to due provision for the carrying on of parochial duty, the benefice of a bankrupt clergyman may be sequestrated by his trustee for the payment of his debts (b). And in general, whenever the bankrupt is in receipt of any salary or income, although earned by personal services, the trustee may intervene, and obtain an order for payment of such salary or income to the trustee; except so much thereof as is necessary for the support of the bankrupt and his family (c).

Even as regards other personal property (including leaseholds) acquired by the bankrupt after the commencement of the bankruptcy and before he obtains his discharge, the trustee has not a complete title, until he intervenes and claims such property; and therefore all transactions with regard to such after-acquired property between the bankrupt and a *bonâ fide* purchaser for value, if carried out before such intervention, are binding as against the trustee (d). But as regards after-acquired real estate of the bankrupt, it was formerly held that the trustee's title was complete at once; and that therefore all dealings therewith by the bankrupt were void (e). But it is now provided

(a) Act of 1883, s. 53; *In re Wicks* (1881) 17 Ch. D. 70.

(b) Act of 1883, s. 52.

(c) *Ibid.* ss. 44, 53; *In re Shine* [1892] 1 Q. B. 522; *In re Graydon* [1896] 1 Q. B. 417; *In re Roberts* [1900] 1 Q. B. 122.

(d) *Cohen v. Mitchell* (1890) 25 Q. B. D. 262; *Clayton's & Barclay's Contract* [1895] 2

Ch. 212; *Mercer v. Vans Colina* [1900] 1 Q. B. 130, n.; *In re Kent County Gas Co.* [1909] 2 Ch. 195.

(e) *In re New Land Development Association & Gray* [1892] 2 Ch. 138; *London & County Contracts v. Tallack* [1903] W. N. 8; *Official Receiver v. Cooke* [1906] 2 Ch. 661.

by the Bankruptcy and Deeds of Arrangement Act, 1913 (a), that all transactions by a bankrupt with any person dealing with him *bonâ fide* and for value in respect of property, whether real or personal, acquired by the bankrupt after the adjudication, shall, if completed before any intervention by the trustee, be valid against the trustee, and that any estate or interest in such property which, by virtue of the enactments relating to bankruptcy, is vested in the trustee, shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction.

The Bankruptcy Act, 1883, moreover, expressly provides, that the tools of a bankrupt's trade, and the necessary wearing apparel of himself, his wife, and children, to a value (inclusive of tools, apparel, and bedding) of the sum of 20*l.*, shall not vest in the trustee (b).

Where a married woman who has been adjudged bankrupt has separate property, the income of which is subject to a restraint on anticipation, the Court has power, on the application of the trustee, to order that, during such time as the Court may direct, the whole or some part of such income shall be paid to the trustee for distribution among the creditors. But in the exercise of this power, the Court must have regard to the means of subsistence available for the woman and her children (c).

When any property of the bankrupt, acquired by the trustee, consists of land of any tenure burthened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is not readily saleable, by reason of its binding the possessor thereof to the performance of

(a) S. 11.

(c) Act of 1913, s. 12 (3).

(b) S. 44.

any onerous act, or to the payment of money, the trustee may, at any time within twelve months from the date of his appointment as trustee, and provided he shall not have omitted for twenty-eight days to reply to any due written inquiry made to him asking whether he intends to disclaim or not, by writing under his hand, *disclaim* such property; but in the case of leases, not without the leave of the Court, except in the case of certain small bankruptcies (a). And such disclaimer, as from the date thereof, operates to determine the rights, interests, and liabilities of the bankrupt and of his property, in or in respect of the property disclaimed; and also discharges the trustee of all personal liability in respect of the property disclaimed, as from the date when the property vested in him (b).

It is sometimes very difficult to decide what effect a disclaimer of this kind has upon the rights of strangers; but the Act of 1883 provides, generally, that any person injured by the operation of this enactment, shall be deemed a creditor of the bankrupt to the extent of such injury, and may prove the same as a debt (c). And, in particular, that, as regards disclaimers of the leases of the bankrupt, the Court may make an order for the vesting of such leases in any one appearing to the Court to be interested therein—e.g., an underlessee of the bankrupt or his mortgagee (whether by demise or by assignment)—provided that such underlessee or mortgagee will assent to undertake the liabilities incident to the lease, that is to say, such of them as would have attached to any absolute assignee of the lease under an express assignment thereof. But the vesting order may limit the liabilities

(a) Act of 1883, s. 55; Act of 1890, s. 13; R. 232. And see *In re Bastable* [1901] 2 K. B. 518.

(b) Act of 1883, s. 55, sub-s. (2).

(c) *Ibid.* sub-s. (7); *In re Hooley* [1899] 2 Q. B. 579.

aforesaid to the leaseholds comprised in the vesting order, *e.g.*, where these leaseholds are portion only of the property comprised in the original lease, or head-lease (a).

When a bankrupt's property comprises a copyright, or an interest in copyright, in respect of which he is liable to pay royalties or a share of profits to the author, the trustee in bankruptcy cannot deal with such copyright or interest in such a way as to prejudice the author's rights (b).

The appointment of the trustee of a bankrupt has a retrospective relation (c). This, indeed, has been the principle of the bankrupt law ever since the time of Queen Elizabeth; and it prevailed, at that period, with an austerity which put wholly out of sight the consideration due to innocent parties, and the safety of commercial transactions. Under the Bankruptcy Act, 1869, however, its harshness was considerably obviated; protection having been extended by that Act to various *bond fide* transactions of the debtor, although they fell within the period covered by the relation back of the trustee's appointment. And now, by the Bankruptcy Act, 1883, it has been provided, that the bankruptcy of any debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which the receiving order is made against him; or, if the bankrupt is proved to have committed more acts of

(a) Act of 1883, s. 55, subss. (6) & (7), amended by Act of 1890, s. 13; *Smalley v. Hardinge* (1881) 7 Q. B. D. 524; *Harding v. Preece* (1882) 9 Q. B. D. 281; *Ex parte Allen, In re Fussell* (1882) 20

Ch. D. 341; *In re Cock, Ex parte Shilson* (1887) 20 Q. B. D. 343; *In re Finley* (1888) 21 Q. B. D. 475.

(b) Act of 1913, s. 25.

(c) *Davis v. Petrie* [1906] 2 K. B. 786.

bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within *three* months next preceding the date of the presentation of the bankruptcy petition (*a*). And, under the Bankruptcy Act, 1890 (*b*), where the adjudication follows upon a receiving order made in lieu of a committal order under section 103 of the Bankruptcy Act, 1883, the bankruptcy relates back to, and commences at, the time of such order, or (in the case of any previous act of bankruptcy) the time of the first of such acts within three months next preceding the date of the receiving order.

But it is provided by the Bankruptcy Act, 1883, that (subject to the provisions hereinafter mentioned regarding certain executions, and regarding the avoidance of voluntary settlements and fraudulent preferences) the following transactions with the debtor shall be good; notwithstanding they may fall within the period covered by the relation back (*c*), viz.:— (1) any payment by the bankrupt to any of his creditors; (2) any payment or delivery to the bankrupt; (3) any conveyance or assignment by the bankrupt for valuable consideration; (4) any contract, dealing, or transaction by or with the bankrupt for valuable consideration. But, in all these cases, the following conditions must be complied with, viz.:— (1) the payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, must have taken place before the date of the receiving order; and (2) the person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction, was

(*a*) S. 43.

(*b*) S. 20.

(*c*) Act of 1883, s. 49; see

*In re Wright* (1876) 3 Ch. D. 70; *In re Dunkley & Son* [1905] 2 K. B. 683.

made, executed, or entered into, must not, at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, have had notice of any available act of bankruptcy committed by the bankrupt. And the Bankruptcy and Deeds of Arrangement Act, 1913 (*a*), provides, that a payment of money or delivery of property to a person subsequently adjudged bankrupt, or to a person claiming by assignment from him shall, notwithstanding anything in the enactments relating to bankruptcy, be a good discharge to the person paying the money or delivering the property, if the payment or delivery is made before the actual date on which the receiving order is made, and (except in cases where the receiving order is made under section 103 of the Act of 1883) without notice of the presentation of the bankruptcy petition, and is either pursuant to the ordinary course of business or otherwise *bonâ fide*.

Executions against the bankrupt, whether by *feri facias* against his goods, or by *elegit* against his lands, or by garnishee order, in general hold good, if perfected before the date of the receiving order, and before notice of the presentation of any petition by or against the debtor, or of the commission of an available act of bankruptcy by him. For this purpose an execution against goods is perfected by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver. But this provision is subject, as regards execution against goods under a judgment for more than twenty pounds, to the provision hereinafter mentioned (*b*).

(*a*) S. 10.

(*b*) See *post*, p. 283. [A creditor who has obtained the appointment of a receiver does

not become a "secured creditor" (*post*, p. 287) in respect of *personalty*; until the fund has actually reached the re-

There are cases, however, in which transactions are void as against the trustee, even independently of the doctrine of relation back. For, first, as regards fraudulent conveyances, the trustee's title will prevail against all dispositions of property, under colour either of alienation or of legal execution, which are not *bonâ fide*, but of a merely feigned or collusive character; whether a prior act of bankruptcy has been committed or not (a).

Secondly, it will prevail against all alienations and payments voluntarily (that is to say, without pressure) made by the debtor shortly before his bankruptcy, with the intention of giving a preference to some particular creditor or creditors (b). For a transaction of this kind evidently tends to defeat the main principle of the bankruptcy law (c); and an express provision is accordingly inserted in the Bankruptcy Act, 1883, similar to one in the Bankruptcy Act, 1869, to the following effect:—that every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered, by a person unable to pay his debts as they become due from his own moneys, in favour of any creditor, or of any trustee for such creditor, with a view to giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the insolvent become bankrupt on a petition presented within three months afterwards, be deemed

ceiver's hands (*Re Potts* [1893] 1 Q. B. 648; *Ridout v. Fowler* [1904] 1 Ch. 658). In the case of land, the rule appears to be different (*Ex parte Evans* (1879) 13 Ch. D. 252); unless the interest in land is a remainder (*In re Harrison & Bottomley* [1899] 1 Ch. 465).]

(a) *Jackson v. Irvin* (1809) 2 Camp. 48.

(b) *Atkinson v. Brindall* (1835) 2 Bing. N. C. 225; *Strachan v. Barton* (1856) 11 Exch. 647.

(c) *Linton v. Bartlett* (1770) 3 Wils. 47.

fraudulent and void as against the trustee. But this section is not to affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt (a).

Thirdly, as regards executions, the Act of 1890 provides :—(1) that where goods are taken in execution, and, before the sale or completion of the execution, notice of the receiving order is served on the sheriff, the sheriff shall on request deliver the goods and any money seized or received in part satisfaction of the judgment, to the official receiver ; the costs of the execution being a first charge on the goods or money so delivered, with power to sell the goods for the purpose of satisfying the charge ; and (2) that where under an execution in respect of a judgment for a sum above twenty pounds, the goods are sold, or money is paid in order to avoid a sale, the trustee, if notice of the bankruptcy petition has been served on the sheriff within fourteen days of such sale or payment, shall be entitled to the proceeds of sale or money paid, less the sheriff's expenses (b). But a purchaser in good faith from the sheriff acquires a good title as against the trustee in bankruptcy (c).

Fourthly, as regards voluntary settlements, it is enacted, that every settlement of property (including every such conveyance or transfer as contemplates the retention of the property by the donee either in its original form or in such form that it can be traced) (d) made by a debtor (not being a settlement

(a) Act of 1883, s. 48 ; Act of 1913, s. 27 and Second Schedule ; *Tomkins v. Saffery* (1877) L. R. 3 App. Ca. 213 ; *Ex parte Stubbins, In re Wilkinson* (1881) 17 Ch. D. 58.

(b) Act of 1890, s. 11 ; *Lole v. Betteridge* [1898] 1 Q. B. 256 ; *In re English &*

*Ayling* [1903] 1 K. B. 680.

(c) Act of 1883, s. 46 (3) ; *In re Hinks, Ex parte Berthier* (1878) 7 Ch. D. 882 ; *In re Pearce, Ex parte Cross-thwaite* (1885) 14 Q. B. D. 966.

(d) *In re Vansittart* [1893] 1 Q. B. 181 ; *In re Plummer* [1900] 2 Q. B. 790.



made before and in consideration of marriage, or in favour of a purchaser or incumbrancer, *bond fide* and for valuable consideration, or a settlement on wife or children of property accruing after marriage in right of the settlor's wife), shall, if the settlor become bankrupt within *two years* after its date, be absolutely void as against his trustee; and shall, if he become bankrupt within *ten years*, be also void against the trustee, unless the parties claiming under the settlement can prove that, at the time it was made, the settlor was solvent without the aid of the property settled, and that the interest of the settlor passed to the trustees of the settlement, or the beneficiaries, on the execution thereof (*a*). But purchasers for value under the settlement, whether they take directly or as sub-purchasers (*b*), who complete their purchases before the date of the act of bankruptcy, are protected (*c*). Moreover, any covenant or contract made in consideration of marriage, either for the future payment of money for the benefit of the settlor's wife, husband, or children, or for the future settlement on the settlor's wife, husband, or children, of property wherein at the date of the marriage the settlor had no estate or interest, and not being property coming to the settlor in right of the settlor's wife or husband, will, if the settlor is adjudged bankrupt, and the covenant or contract has not been executed (*d*) at the date of the commencement of the bankruptcy, be void against the trustee in bankruptcy, except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy; but any such claim will be postponed until all claims of

(*a*) Act of 1883, s. 47; *Ex parte Dawson* (1875) L. R. 19 Eq. 433; *Re Lowndes* (1887) 18 Q. B. D. 677.

(*b*) *Re Hart* [1912] 3 K. B. 6.

(*c*) *Sanguinetti v. Stuckey's*

*Banking Co.* [1895] 1 Ch. 176; *Carter's and Kenderdine's Contract* [1897] 1 Ch. 776.

(*d*) Presumably, this means 'carried out' or 'completed.'

the other creditors for valuable consideration in money or money's worth have been satisfied. Any payment of money (not being payment of premiums on a policy of life assurance) or any transfer of property made by the settlor in pursuance of such a covenant or contract is void against the trustee in the settlor's bankruptcy ; unless the persons to whom the payment or transfer was made prove either (i.) that the payment or transfer was made more than two years before the commencement of the bankruptcy, or (ii.) that at the date of the payment or transfer the settlor was able to pay all his debts without the aid of such money or property, or (iii.) that the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from, or on the death of, a particular person named in the covenant or contract, and was made within three months after the money or property came into the possession or control of the settlor. In the event of any such payment or transfer being declared void, the persons to whom it was made are entitled to claim for dividend in the same manner as if the covenant or contract had not been executed (a) at the commencement of the bankruptcy (b).

Lastly, an assignment made by any person engaged in any trade or business who is subsequently adjudicated bankrupt, of his existing or future book debts or any class thereof, is void against the trustee as regards any book debts which have not been paid at the commencement of the bankruptcy ; unless the assignment has been registered as if it were a bill of sale given otherwise than by way of security (c). But this enactment does not render void any assignment of book debts due from specified debtors, or growing due under specified contracts, or any assignment of book

(a) See last note.

(c) *Ibid.* s. 14 ; *ante*, p. 79.

(b) Act of 1913, s. 13.

debts included in a transfer of a business made *bonâ fide* and for value, or any assignment of assets for the benefit of creditors generally (a).

One of the chief duties of the trustee consists in declaring, from time to time a dividend amongst the creditors (b). And, with regard to the payment of dividends, the Act provides, that, subject to the retention of such sums as may be necessary for the costs of administration, or otherwise, the trustee shall, with all convenient speed, declare and distribute dividends amongst the creditors who have proved their debts; that the first dividend, if any, shall be declared and distributed within four months after the conclusion of the first meeting of creditors, unless the trustee satisfies the committee of inspection that there is sufficient reason for postponing the declaration to a later date; that subsequent dividends shall, in the absence of sufficient reason to the contrary, be declared and distributed at intervals of not more than six months (c); and that, when the trustee has realised all the property of the bankrupt, or so much thereof as can, in the joint opinion of himself and of the committee of inspection, be realised without needlessly protracting the trusteeship, he shall declare a final dividend. But before so doing, he is to give notice, in the prescribed manner, to the persons whose claims to be creditors have been notified to him, but not established to his satisfaction, that if they do not establish their claims to the satisfaction of the Court within a time limited by the notice, he will proceed to make a final dividend without regard to their claims (d). On the expiration of the time so limited, or of any extension thereof that may have been granted to any claimant, the remaining assets of the debtor are divided amongst the creditors who have proved their debts, without regard to the

(a) Act of 1913, s. 14.

(b) Act of 1883, ss. 58–63.

(c) *Ibid.* s. 58.

(d) *Ibid.* s. 62.

claims of any other persons. If any surplus remains after paying every creditor in full, with interest where that is allowed (a), and after paying the costs, charges, and expenses of the administration, that surplus belongs to the bankrupt (b).

Dividends are paid rateably among all the creditors, according to the *quantity* of their debts, no regard being in general had to the *quality* of them. Hence, judgments and recognisances, and other debts by record or specialty, are all put on a level with debts by mere simple contract; voluntary covenants and bonds are not postponed to debts incurred for value; and equitable debts are on the same footing as legal debts. But a creditor who has a specific security on the property of the bankrupt (such as a mortgage or pledge) is entitled, notwithstanding the bankruptcy, either to give up his security and prove for his whole debt, or else to realise his security, or give credit for its value, and to prove and receive a dividend *pari passu* with the other creditors in respect of any overplus remaining unpaid (c). So, too, a landlord who desires, after the commencement of the bankruptcy, to distrain for rent on the bankrupt's goods, is entitled to make such distress available for his separate payment, to the extent of six months' rent accrued due prior to the date of the order of adjudication (d); though for the remainder he must come in *pari passu* with the rest of the creditors (e). And to this we may

(a) Act of 1883, s. 40, sub-s. (5); Second Schedule, R. 20; Act of 1890, s. 23; Act of 1913, s. 22.

(b) Act of 1883, s. 65.

(c) *Ibid.* ss. 6, 39; Second Schedule, Rr. 9-17; *In re Turner* (1881) 19 Ch. D. 105.

(d) Act of 1883, s. 42; Act of 1890, s. 28; *Ex parte Voisey*,

*In re Knight* (1882) 21 Ch. D. 442; *In re Howell* [1895] 1 Q. B. 844. But such distress is not available for rent payable in respect of any period subsequent to the date of the distress (Act of 1913, s. 18).

(e) Act of 1883, s. 42; *Paull v. Best* (1863) 3 B. & S. 537.

add, that a priority is given (and to some extent even as against the landlord's preferential right of distress) to claims for compensation under the Workmen's Compensation Act, 1906 (*a*), to the extent of 100*l.* in the case of each workman ; to contributions due from the employer under the National Insurance Act, 1911 (*b*) ; to parochial and other local rates, and to any assessed, land, property, or income tax due from the bankrupt, to the extent of one year's assessment ; and also to the wages or salaries of the debtor's clerks or servants, not exceeding fifty pounds each, due in respect of services rendered during the four months before the date of the receiving order ; and also to the wages of any labourer or workman, not exceeding 25*l.*, due in respect of services rendered during the two months before the date of the receiving order. All these last mentioned classes of debts are to be paid in full, if the property of the bankrupt is sufficient, in priority to all others ; but are to abate *inter se* if the property of the bankrupt is insufficient for their payment (*c*). With these exceptions, and with the exception of the debts which, under the provisions of the Partnership Act, 1890, are only to be paid after all other debts for value have been satisfied in full (*d*), and of a debt for money lent by a wife to her husband or by a husband to his wife to be employed in trade, with respect to which the Married Women's Property Act, 1882 (*e*), and the Bankruptcy and Deeds of Arrangement Act, 1913, contain similar provisions (*f*), all debts provable under the bankruptcy are paid *pari passu* (*g*).

With regard to the distribution of the bankrupt's estate, it is to be further observed, that demands in

(*a*) S. 5 ; *post*, pp. 369–374.

(*b*) S. 110.

(*c*) Act of 1883, s. 40 ;  
Preferential Payments in  
Bankruptcy Act, 1888.

(*d*) *Ante*, p. 197.

(*e*) S. 3 ; *In re Cronmire*  
[1901] 1 K. B. 480.

(*f*) Act of 1913, s. 12 (4).

(*g*) Act of 1883, s. 40 (4).

the nature of unliquidated damages, arising otherwise than by reason of a contract, promise, or breach of trust, are not provable in the bankruptcy (a); and that no person having notice of any act of bankruptcy available against the bankrupt can prove for any debt or liability contracted by the bankrupt subsequently to the date of such notice having been received (b). With these exceptions, however, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred previously to such date, may be proved (c). Where the debt or liability does not bear a certain value, by reason of its being subject to any contingency, as, for instance, that of a widow marrying again, or for any other reason, the Act directs, that the value of the debt or liability shall be estimated by the trustee, subject to an appeal to the Court, and that dividends shall be paid on such value. If in the opinion of the Court the value is incapable of being fairly estimated, the Court may make an order to that effect, in which case the debt or liability will be deemed to be one not provable in bankruptcy. If in the opinion of the Court the value is capable of being fairly estimated, the Court may direct the value to be assessed before the Court itself without the intervention of a jury (d). The term 'liability' includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, agreement, contract, or undertaking, whether likely or not to occur before the close

(a) Act of 1883, s. 37, sub-s. (1). See *Ex parte Baum* (1874) L. R. 9 Ch. App. 673; *Watson v. Holliday* (1882) 20 Ch. D. 780.

(b) Act of 1883, s. 37, sub-s. (2).

(c) *Ibid.* s. 37, sub-s. (3).

(d) *Ibid.* sub-ss. (4) to (7).

of the bankruptcy, and, generally, any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of, money or money's worth; whether fixed or unliquidated, present, future, or contingent, and whether capable of being ascertained by fixed rules, or by jury only, or as a matter of opinion (*a*).

V. *The bankrupt's discharge*.—To every bankrupt who conforms in all points to the directions of the statute, the law makes full amends for all this rigour and severity; for he may, at any time after being adjudged bankrupt, apply to the Court for his order of discharge. This application will be heard in open court as soon as conveniently can be after his public examination is concluded, but not before (*b*). On the hearing of the application, the Court may grant the bankrupt an absolute order of discharge; the effect of which will be to release him from all debts provable in bankruptcy, with the following exceptions—

- (i) any debt on a recognizance;
- (ii) any debt with which the bankrupt may be chargeable at the suit of the Crown, or of any person, for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence; (he is not to be discharged from such excepted debts unless the Treasury certify in writing their consent to his being discharged therefrom);
- (iii) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which the bankrupt was a party;

(*a*) Act of 1883, s. 37, sub-s. (8).      (*b*) Act of 1890, s. 8.

- (iv) any debt or liability whereof he has obtained forbearance by any fraud to which he was a party (a) ;
- (v) any liability under a judgment against him in an action for seduction, or under an affiliation order, or under a judgment against him as co-respondent in a matrimonial cause ; except to such an extent and under such conditions as the Court expressly orders in respect of such liability (b).

A bankrupt, duly discharged, is moreover entitled, when the discharge is absolute and unconditional, to enjoy, free from the claims of his former creditors, other than those before mentioned as continuing, all future acquisitions of property. So that, in the language often applied to the case of a discharge under former statutes, “ he becomes a clear man again ” (c), subject only to continuing to give to the trustee such assistance as may be required for the realisation and distribution of his former property ; failing which his discharge may be revoked (d). But it is hardly necessary to observe, that the bankrupt’s discharge does not free from liability any surety for, or co-surety or co-contractor with, the bankrupt, or any partner of the bankrupt (e) ; though, on the other hand, the bankrupt cannot, by any promise of his, revive a debt from which he has been duly released by discharge (f).

But the bankrupt is not, as a matter of course,

(a) Act of 1883, s. 30 ;  
*Cooper v. Prichard* (1883) 11  
 Q. B. D. 351.

(b) Bankruptcy Act, 1890,  
 s. 10.

(c) *Ebbs v. Boulnois* (1875)  
 L. R. 10 Ch. App. 479 ; *In re*  
*Pettitt’s Estate* (1876) 1 Ch. D.  
 478.

(d) Act of 1890, s. 8, sub-  
 s. (8).

(e) Act of 1883, s. 30, sub-  
 s. (4).

(f) *Rimini v. Van Praagh*  
 (1872) L. R. 8 Q. B. 1 ; *Elmslie*  
*v. Corrie* (1878) 4 Q. B. D.  
 295 ; *Ex parte Barrow, In re*  
*Andrews* (1881) 18 Ch. D. 464.



entitled to the absolute and unconditional order of discharge above referred to. For the Court takes into consideration the report of the official receiver as to the bankrupt's conduct and affairs, including a report as to his conduct during the bankruptcy proceedings. And the Court *may* refuse the absolute order of discharge, or suspend the operation of such an order for a specified time, or grant the order subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property ; and the Court *must* refuse the order of discharge in all cases where the bankrupt has committed any misdemeanour under the Bankruptcy Act, 1883, or Part II. of the Debtors Act, 1869, or any amendment thereof (*a*). And further, the Court *must* either refuse the order, or at least suspend the operation of it for a period of not less than two years, or until a dividend of not less than ten shillings in the pound has been paid to the creditors, or grant the order subject to such conditions as aforesaid, or require the bankrupt, as a condition of his discharge, to consent to judgment being entered up against him for any unsatisfied balance of the debts provable, such judgment to be satisfied out of his future earnings and after-acquired property, upon proof of any one of the following facts, viz.:—(1) that the bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities (*b*), unless he satisfies the Court that this fact has arisen from circumstances for which he cannot justly be held responsible ; (2) that the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and finan-

(*a*) See *post*, pp. 294–299.

¶ (*b*) If this is the only reason for refusing or suspending the discharge, the suspension

may be for a period of less than two years (Act of 1913, s. 6).

cial position within the three years immediately preceding his bankruptcy ; (3) that the bankrupt has continued to trade after knowing himself to be insolvent ; (4) that the bankrupt has contracted any debt provable in the bankruptcy, without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it ; (5) that the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities ; (6) that the bankrupt has brought on his bankruptcy by rash and hazardous speculations or unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs ; (7) that the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him ; (8) that the bankrupt has, within three months preceding the date of the receiving order, incurred unjustifiable expense by bringing a frivolous or vexatious action ; (9) that the bankrupt has, within three months preceding the date of the receiving order, and when unable to pay his debts as they become due, given an undue preference to any of his creditors ; (10) that the bankrupt has, within three months preceding the date of the receiving order, incurred liabilities with a view of making his assets equal to ten shillings in the pound on the amount of his unsecured liabilities ; (11) that the bankrupt has on any previous occasion been adjudged bankrupt, or made a composition or arrangement (statutory or otherwise) with his creditors ; (12) that the bankrupt has been guilty of any fraud or fraudulent breach of trust (a). Also, where, before his marriage, the debtor has made a settlement, or entered into a covenant to settle property, on his wife and children,

(a) Act of 1890, s. 8 ; *Ex parte Campbell* (1885) 15 Q. B. D. 213.

when he was not really in a position to do so, and such settlement or covenant was in reality designed to defeat or delay his creditors, the order of discharge may be either refused or suspended, or granted subject to conditions (a).

Upon the expiration of two years from the date of a conditional order of discharge, if the bankrupt satisfies the Court that there is no reasonable probability of his being in a position to comply with the conditions annexed to his discharge, the Court may grant him his absolute discharge, or otherwise modify the conditions thereof (b).

VI. *Criminal offences connected with bankruptcy.*—A bankrupt or person in respect of whose estate a receiving order has been made is guilty of a *mis-demeanor* under the provisions for the punishment of fraudulent debtors contained in section 11 of the Debtors Act, 1869, as modified by the Bankruptcy Acts, 1883 to 1913 (c), if he is guilty of any of the following offences, viz. :—(1) if he does not, to the best of his knowledge and belief, fully and truly discover to the trustee all his property, real and personal, and how and to whom and for what consideration and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expenses of his family; unless he proves that he had no intent to defraud; (2) if he does not deliver up to the trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up; unless he proves that he had no intent to defraud; (3) if he

(a) Act of 1883, s. 29.

(b) Act of 1890, s. 8.

(c) The section with the amendments embodied in it

is set out in Schedule I. of the Bankruptcy and Deeds of Arrangement Act, 1913.

does not deliver up to the trustee, or as he directs, all books, documents, papers, and writings in his custody or under his control, which relate to his property or affairs; unless he proves that he had no intent to defraud; (4) if, after the presentation of a petition, or within six months before, he conceals any part of his property to the value of ten pounds or upwards, or conceals any debt due to or from him; unless he proves that he had no intent to defraud; (5) if, within the same period, he fraudulently removes any part of his property to the value of ten pounds or upwards; (6) if he makes any material omission in any statement relating to his affairs; unless he proves that he had no intent to defraud; (7) if, knowing or believing that a false debt has been proved against his estate, he fails for the period of a month to inform the trustee thereof; (8) if, after the presentation of a petition, he prevents the production of any book, document, paper, or writing, affecting or relating to his property or affairs; unless he proves that he had no intent to conceal the state of his affairs or to defeat the law; (9) if, after the presentation of a petition, or within six months before, he (either as party or privy) conceals, destroys, mutilates, or falsifies any book or document affecting or relating to his property or affairs; unless he proves that he had no intent to conceal the state of his affairs or to defeat the law; (10) if, within the same period, he makes, or is privy to the making of, any false entry in any such book or document; unless he proves that he had no intent to conceal the state of his affairs or to defeat the law; (11) if, within the same period, he fraudulently parts with, alters, or makes any omission in any document affecting or relating to his property or affairs or is privy to any such fraudulent parting with, altering, or making an omission; (12) if, after presentation of a petition, or at any meeting of his creditors held within six months

before, he attempts to account for any part of his property by fictitious losses or expenses; (13) if, within six months next before the presentation of a petition (or in the case of a receiving order made under the Bankruptcy Act, 1883 (*a*), within six months before the date of the order) or after the presentation of a petition and before the making of a receiving order, he, by any representation or other fraud, has obtained property on credit, and has not paid for the same; (14) if, within the same period, he has obtained, under the false pretence of carrying on business and (if a trader) of dealing in the ordinary way of his trade, any property on credit and has not paid for the same; unless he proves that he had no intent to defraud; (15) if, within the same period, he pawns, pledges, or disposes of any property which he has obtained on credit, and has not paid for; unless in the case of a trader such pawning, pledging, or disposition is in the ordinary way of his trade, and unless in any case he proves that he had no intent to defraud; (16) if he is guilty of any false representation or other fraud, for the purpose of obtaining the consent of his creditors, or any of them, to an agreement with reference to his affairs, or to his bankruptcy.

A person who is guilty of any of the foregoing offences under section 11 of the Debtors Act, 1869, if convicted on indictment, is liable to imprisonment for any term not exceeding two years, with or without hard labour.

In the three following cases a person is guilty of an offence, and may be dealt with and punished as if he had been guilty of an offence under the Debtors Act, 1869—

- (i) If a person, who, having on any previous occasion been adjudged a bankrupt or made a composition with his creditors, is adjudged bankrupt, or against whom a receiving order

is made, has, during the whole or any part of the two years immediately preceding the date of the presentation of the petition, been engaged in trade or business, and has not kept proper books of account whilst so engaged, or has not preserved all books of account so kept. But a person is not to be convicted of this offence if his unsecured liabilities do not exceed 100*l.*; or if he proves that in the circumstances the omission was honest and excusable (*a*).

- (ii) If a person, who has been adjudged bankrupt, or against whom a receiving order has been made, has been engaged in any trade or business, and, having outstanding at the date of the receiving order any debts contracted in the course of and for the purposes of such business—
- (i) has within two years before the presentation of the petition materially contributed to, or increased the extent of, his insolvency by gambling, or by rash and hazardous speculations unconnected with his trade or business, or
  - (ii) has, between the date of the presentation of the petition and the date of the receiving order, lost any part of his estate by such gambling or speculation, or (iii) fails, on being required by the official receiver at any time, or, in the course of his public examination, by the Court, to account for the loss of any substantial part of his estate during a period of one year before the presentation of the petition or between that date and the date of the receiving order, to give a satisfactory explanation (*b*).

A prosecution for either of the offences (i) and (ii) is not to be instituted, except by order of the Court,

(*a*) Act of 1913, s. 3.

(*b*) *Ibid.* s. 4.

or where the receiving order is made within two years from the 1st April, 1914 (a).

- (iii) If an undischarged bankrupt (i), either alone or jointly with any other person, obtains credit to the extent of ten pounds or upwards from any person without informing such person that he is an undischarged bankrupt, or (ii) engages in any trade or business under a name other than that in which he was adjudicated bankrupt, without disclosing to all persons with whom he enters into any business transactions the name under which he was adjudicated bankrupt (b).

Under the Debtors Act, 1869, a bankrupt, or person against whom a receiving order has been made, is guilty of *felony*, and is liable to two years' imprisonment, with or without hard labour, if, after the presentation of the petition (or within four months before), he has, with intent to defraud his creditors, quitted, or attempted or made preparation to quit, England, and has taken, or attempted to take, with him any part of his property, to the amount of twenty pounds or upwards, which ought by law to be divided among his creditors (c).

By the Bankruptcy and Deeds of Arrangement Act, 1913, any offence under, or which may be dealt with as if it were an offence under, the Debtors Act, 1869, alleged to have been committed by a person who has been adjudged bankrupt or against whom a receiving order has been made, may be prosecuted summarily. But a court of summary jurisdiction cannot award a greater term of imprisonment than six months, with or without hard labour, for any such offence; and summary proceedings are not in any case to be instituted more than three years after the commission of the offence, nor more than one year after

(a) Act of 1913, s. 4.

(b) *Ibid.* s. 5.

(c) Debtors Act, 1869, s. 12.

the offence was first discovered by the official receiver or trustee, or (if the proceedings are instituted by a creditor) by the creditor.

Under the Debtors Act, 1869, any person (whether or not he be a bankrupt or have had a receiving order made against him) is deemed guilty of a misdemeanor, and is liable on conviction to imprisonment for one year, with or without hard labour, who, with intent to defraud his creditors, commits any of the following offences, viz. :—(1) if, in incurring any debt or liability, he obtains credit under false pretences, or by means of any other fraud ; (2) if he makes or causes to be made, any gift, delivery, or transfer of, or any charge on, his property ; (3) if he conceals or removes any part of his property, within two months before the date of any unsatisfied judgment, or order for payment of money, obtained against him (a).

VII. *Compositions and schemes of arrangement.*—Having now given some account of the existing system under which the law of bankruptcy is administered, we will conclude the chapter by some explanation of an alternative method of proceeding, which is, to some extent, recognised by the Bankruptcy Act, 1883, and which has always been in very extensive use ; being found in some respects more convenient than a bankruptcy. And we will first premise generally, that, although the machinery adopted for this alternative method differs in some of its details from that which has been devised for a bankruptcy, the general principles of the law of bankruptcy are applicable to it. For it has been expressly provided, by the Bankruptcy Act, 1890, that the trustee under a composition or scheme of arrangement under that Act shall have the same powers and perform the same duties as a trustee

(a) *Ibid.* s. 13.



under a bankruptcy; that the property of the debtor shall be distributed in the same manner as in a bankruptcy; and, generally, that all the provisions of that Act with reference to bankruptcy, shall apply (*mutatis mutandis*) to such a composition or scheme of arrangement (*a*).

It has always been considered within the true spirit of our modern bankrupt laws, to provide a means for carrying into effect any amicable arrangements between a debtor and his creditors; and such arrangements have, in general, been free from any external interference, except so far as the prevention of fraud and the interests of commercial morality have otherwise seemed to require. Thus, a debtor who has no assets at all cannot, in common reason or justice, be permitted to escape by any such arrangement (*b*).

Such a scheme may now, under the provisions of the Bankruptcy Acts, be adopted either before or after the adjudication of a debtor. In the former case, the debtor lodges his proposal with the official receiver within four days of submitting his statement of affairs. In the latter, the creditors may, at any time before the debtor's discharge, accept a similar proposal (*c*). But the scheme is not to be binding on the creditors, unless it is carried by a resolution passed by a majority in number, representing three-fourths in value, of all the creditors who have proved, nor unless it is approved by the Court; the application for that purpose being made either by the official receiver or the trustee, or by the debtor. The application is not to be heard until after the public examination is concluded (*d*).

, (*a*) Act of 1890, s. 3, sub-ss. (16), (17), re-enacting similar provisions in the Act of 1883, s. 18.

(*b*) *Ex parte Aaronson* (1878) 7 Ch. D. 713; *Ex parte Ball, In re Parnell* (1882) 20

Ch. D. 670; *Ex parte Campbell* (1885) 15 Q. B. D. 213.

(*c*) Act of 1890, s. 3 (1); Act of 1883, s. 23.

(*d*) Act of 1890, s. 3 (2) to (6).

The Court is required, before approving a composition or scheme, to hear a report of the official receiver or the trustee as to its terms, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor (a) ; and no composition or scheme is to be approved which does not provide for the payment, in priority to other debts, of all debts directed to be so paid in the distribution of the property of a bankrupt (b). If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is *required* under the Act, when the debtor is adjudged bankrupt, to refuse his discharge, the Court must refuse to approve the composition or scheme (c). Also, if any such facts are proved as would under the Act justify the Court in refusing, qualifying, or suspending the debtor's discharge, the Court must, unless reasonable security is given for the payment of five shillings in the pound on the unsecured debts, refuse to approve the composition or scheme (d). And in all other cases, the Court *may*, in its discretion, refuse to approve the composition or scheme (e).

If the Court approves the composition or scheme, the approval may be signified by the order of the Court, or by the seal of the Court being attached to the proposal ; and the composition or scheme so approved is binding on all the creditors, so far as relates to any debts due to them from the debtor, and provable in bankruptcy. But it does not release the debtor from any liability under a judgment against him in an action for seduction, or under an affiliation order, or under

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| (a) Act of 1890, s. 3 (7).                                 | s. 3 (9) ; Act of 1913, s. 7.  |
| (b) <i>Ibid.</i> s. 3 (18) (see <i>ante</i> ,<br>p. 288).  | (e) Act of 1890, s. 3 (10) ;<br><i>Ex parte Campbell</i> (1885) 15<br>Q. B. D. 213 ; <i>Ex parte Milner</i> ,<br><i>In re Milner</i> , <i>ibid.</i> 605 ; <i>In re</i><br>E. A. B. [1902] 1 K. B. 457. |
| (c) <i>Ibid.</i> s. 3 (8).                                 |  |
| (d) <i>In re Flew</i> [1905] 1<br>K. B. 278 ; Act of 1890, |  |

a judgment against him as a co-respondent in a matrimonial cause; except to such an extent and under such conditions as the Court expressly orders in respect of such liability (a). Nor is such composition or scheme binding on any creditor so far as regards a debt or liability from which the debtor would not be discharged by an order of discharge in bankruptcy; unless the creditor assents to the composition or scheme (b).

The provisions of the composition or scheme when approved may be enforced by the Court, on application by any person interested; and any disobedience to an order of the Court made on the application is deemed a contempt of court (c). But if default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court, on satisfactory evidence, that the composition or scheme cannot, in consequence of legal difficulties or for any sufficient cause, proceed without injustice, or undue delay, to the creditors or to the debtor, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme, without prejudice to anything that may in the meantime have been done under the composition or scheme (d).

If, where the proposal is presented after adjudication, the creditors accept and the Court approves the composition or scheme, it may make an order annulling the bankruptcy, and vesting the property of the bankrupt in him, or in such other person as the Court may appoint, on such terms, and subject to such conditions, if any, as the Court may declare. But if default is

(a) Act of 1890, s. 3 (11),  
(12).

(b) Act of 1883, s. 19; Act  
of 1890, s. 3 (19); *In re Sewell*  
[1909] 1 Ch. 806.

(c) Act of 1890, s. 3 (14).

(d) Act of 1883, s. 18 (11);  
*Bramble v. Moss* (1868) L. R.  
3 C. P. 458; *Ex parte Chesney*,  
*In re Dempster* (1878) 9 Ch. D.  
701.

made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on the application of any person interested, re-adjudge the debtor bankrupt, and annul the composition or scheme, without prejudice to anything that may in the meantime have been done under it (a).

The statutory arrangement arrived at, or composition accepted, under the provisions of the Bankruptcy Acts. 1883–1913, is to be distinguished from a debtor's deed of arrangement or composition at the common law ; in respect that the latter arrangement or composition is not binding on the minority, even although accepted by a majority of the creditors (b), and in respect that, not being sealed with the seal of the Court, or embodied in an order of the Court, it is not summarily enforceable. Every such deed of arrangement or composition at the common law, is, however, now described as a ' deed of arrangement ' ; and, as such, is required to be registered at the office of the Registrar of Bills of Sale (c).

A number of novel provisions with regard to deeds of arrangement have been introduced by Part II. of the Bankruptcy and Deeds of Arrangement Act, 1913. In particular (1) every such deed will be void, unless before, or within twenty-one days after its registration, or within such extended time as the Court may allow, it has received the assent of a majority in number and value of the creditors (d) ; (2) the trustee under such a deed is required to give security to the Registrar of the Court in a sum equal to the estimated assets available for distribution among the unsecured creditors,

(a) Act of 1883, s. 23 ; Act of 1890, s. 6.

(b) *Sibree v. Tripp* (1846) 15 M. & W. 23.

(c) Deeds of Arrangement Act, 1887, s. 5.

(d) Act of 1913, s. 28.

unless a majority in number and value of the creditors dispense with his giving security (*a*) ; (3) a trustee who acts under such deed after it has to his knowledge become void by reason of non-compliance with the requirements of the Acts of 1887 and 1913, or after he has failed to give security as required by the latter Act, is subjected to pecuniary penalties (*b*) ; (4) the trustee may serve on any creditor a notice in writing of such deed having been executed, and of the filing of the certificate of the creditors' assents, with an intimation that the creditor will not, after the expiration of one month after service of the notice, be entitled to present a bankruptcy petition founded on the execution of the deed, or on any other act committed by the debtor in the course of or for the purpose of proceedings preliminary to the execution of the deed, as an act of bankruptcy. The effect of serving such notice is that, after the expiration of that period, the creditor will not be entitled to present any such petition, unless the deed becomes void (*c*) ; (5) provision is made for the audit of the accounts of a trustee of a deed of arrangement, if such audit is asked for by an application in writing to the Board of Trade, on the part of a majority in number and value of the creditors (*d*).

(*a*) Act of 1913, s. 29.

(*b*) *Ibid.* s. 30.

(*c*) *Ibid.* s. 31.

(*d*) *Ibid.* s. 32.

## CHAPTER VII.

## OF TITLE BY WILL AND BY ADMINISTRATION.

WE now proceed to consider the two methods of acquiring personal property by *will* and by *administration*. And these we shall consider in one and the same chapter ; they being in their nature sufficiently connected for this purpose.

When considering the law of devises with reference to *real estate*, our attention was directed to the subject of wills or testaments ; and we were led on that occasion to expound the nature and origin of testamentary dispositions in general, and to notice a variety of matters respecting wills which it may be useful to recall thus generally to the reader's recollection, but which it is not necessary to repeat (*a*). Our present object is to treat exclusively of a will or of an administration considered as a method of acquiring title to *personal estate*, including chattels real ; which subject formerly belonged to the jurisdiction of the ecclesiastical courts, but has been now transferred to the Probate Division of the High Court of Justice, the successor of the Court of Probate, a new secular Court established by the Court of Probate Act, 1857.

It is proposed, first, to trace the history of the title to personal estate by will and by administration ; second, to show the manner of making a will, and its requisites, when considered as a disposition of personal estate ; third, to show the manner of granting an

(*a*) *Ante*, bk. ii. pt. i. ch. xxii. vol. i. pp. 454-462.

administration ; and, lastly, to select some few of the general heads appertaining to the office and duty of executors and administrators.

I. [Though wills operating on personalty have been of immemorial use in England, it is to be understood that this power of bequeathing did not extend originally to all a man's personal estate (*a*). On the contrary, Glanville informs us that, by the law as it stood in the reign of Henry the Second, a man's goods were to be divided into three equal parts ; of which one went to his lineal descendants, another to his wife, and the third only was at his own disposal. Or, if he died without a wife, he might then have disposed of one moiety, and the other moiety went to his children. And so, *à converso*, if he had no children, the wife was entitled to one moiety ; and he might bequeath the other. Only if he died without either wife or issue, the whole was at his own disposal (*b*). The shares of the wife and children were called their 'reasonable parts' ; and the writ *de rationabili parte bonorum* was given to recover them (*c*).

This continued to be the law of the land at the time of Magna Carta (*d*) ; which provided that the King's debts should first of all be levied, and then that the residue of the goods should go to the executor to perform the will of the deceased, saving to the widow and children their reasonable parts—*salvis uxori ipsius et pueris suis rationabilibus partibus suis* (*e*). In the reign of King Edward the Third, this right of the wife and children was still held to be the universal or common law ; though frequently pleaded as the

(*a*) For the early history of wills, see Pollock and Maitland, *Hist. of Eng. Law* (2nd edn.), pp. 314–363.

l. ii. cap. 26 ; Flet. l. ii. cap. 57.

(*c*) F. N. B. 122.

(*d*) See cap. 26 (ed. Stubbs).

(*e*) *Ibid.*

(*b*) L. 7, cap. 5 ; Bracton,

[local custom of Berks, Devon, and other counties (a). And Bracton lays down the doctrine of the 'reasonable part' to be the common law, in a passage which appears to have been misunderstood by Sir Edward Coke (b). Also Glanville, Fleta, the Year Books, and Fitzherbert, do all agree with Bracton, that this right to the *pars rationabilis* was by the common law; and in the reign of Charles the First, Sir Henry Finch lays it down, expressly, to be the general law of the land (c). A similar rule continues to this day to be the law of our sister kingdom of Scotland (d).

But in England the common law in this particular has been now completely altered, although by imperceptible degrees; and a man has for a long time been able to bequeath the whole of his goods and chattels to whomsoever he will. The restricted power of bequest continued, however, in the province of York, the principality of Wales, and the City of London, until comparatively modern times. But even this partial restriction was eventually abolished, by the 4 W. & M. (1692) c. 2 (explained by the 2 & 3 Anne (1703) c. 5), for the province of York, by the 7 & 8 Will. 3 (1696) c. 38, for the principality of Wales, and by the 11 Geo. 1 (1724) c. 18, for the City of London; these several statutes having successively enacted, that persons within those districts, and liable to their customs, might dispose of all their personal estates by will. Whereby the claims of the widow, children, and other relations to the contrary were totally barred. Thus is the old common law now utterly abolished throughout all the kingdom of England; and a man may bequeath the whole of his chattels as freely as he formerly could his third part or moiety. In disposing of which, he

(a) *Reg. Brev.* 142; *Co. Litt.* 176.

(b) *L. ii. cap. 26, s. 2*; *2 Inst.* 33.

(c) *Finch, Discourse*, 175.

(d) *Dalrymple, Feudal Property*, 145; *Ersk. Inst. b. iii. tr. 9, s. 15.*



[was bound, by the custom of many places, to remember his lord and the church, by leaving to them respectively his two best chattels, which was the original of heriots, and of mortuaries ; and afterwards he was left at his own liberty to bequeath the remainder as he pleased.

Where a man made no disposition of such of his goods as were testable, he was said to die intestate ; and in such case, it is said, that, by the old law, the King, as *parens patriæ*, was entitled to seize upon his goods (a). This prerogative the King continued to exercise for some time through his ministers of justice ; but, more commonly, he granted the franchise to lords of manors and others, who accordingly long enjoyed a prescriptive right to grant administration to their intestate suitors, in their own courts baron and other courts, or to have the wills of such suitors there proved, in case they made testamentary dispositions (b). Afterwards the Crown, in favour of the Church, invested divers prelates with this branch of his prerogative ; which was done, saith Perkins, because it was intended by the law, that spiritual men were of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased (c). The goods, therefore, of intestates were in this manner given to the Ordinary, that is, to the ordinary ecclesiastical judge of the place ; who was, generally speaking, the bishop of the diocese. And he might seize the goods, and keep them without wasting, and might also give, aliene, or sell them at his will, and dispose of the money *in pios usus* : but, if he did otherwise, he broke the confidence which the law

(a) *Hensloe's Case* (1600) 9 Rep., at 38 b. This is, however, contrary to the opinion of Selden (*Original of Ecclesiastical Jurisdiction of Testaments*, ed. 1726, p. 1681), and of

Pollock and Maitland, *op. cit.* ii. p. 360 (2nd ed.).

(b) *Hensloe's Case* (1600) 9 Rep., at 37 b.

(c) *Profitable Book*, s. 486.

[reposed in him (a). So that, properly, the whole interest and power thus given or granted to the Ordinary, was but that of being the King's almoner within his diocese ; in trust to distribute the intestate's goods in charity to the poor, or for such uses as the zeal of the times denominated pious. And, as the Ordinary had thus the administration of the effects of intestates, a jurisdiction in the matter of wills, also, of course, followed ; for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate whose right of distributing the dead man's chattels was superseded thereby.

The goods of the intestate being thus vested in the Ordinary, the prelates were originally accountable only to God and to themselves. This led to abuse, even in Fleta's time (b). And the abuse appears to have been carried to a great length (c) ; so much so, that the clergy in fact appropriated to themselves (under the name of the church and the poor) the whole residue of the deceased's estate, after the *partes rationabiles* of the wife and children, without paying the lawful debts of the deceased at all. For which reason it was enacted, by the Statute of Westminster the Second (d), that the Ordinary should be bound to pay the debts of the intestate, so far as his goods extended, in the same manner that executors were bound in case the deceased had left a will. But inasmuch as, after that statute, the *residuum*, after payment of the debts, still remained in the hands of the priests, to be applied to whatever purposes the conscience of the Ordinary approved, therefore the legislature again interposed, to prevent the Ordinaries from keeping administrations in their own hands, or in those of their dependants. And

(a) Finch, *Discourse*, 173, 42.

174.

(b) L. ii. cap. 57, s. 10.

(c) Decretal, l. v. t. 3, ch.

(d) 13 Edw. 1 (1285) c. 19 ;

*Snelling's Case* (1595) 5 Rep.

83 a.

[therefore, by the 31 Edw. 3 (1357) c. 11, the Ordinary was required, in case of intestacy, to depute the next and most lawful friend of the deceased to administer his goods. And these administrators were put upon the same footing, with regard to suits and to accounting, as executors appointed by will; and that was the original of administrators, who were formerly but the officers of the Ordinary, appointed by him in pursuance of this statute.

The 31 Edw. 3 c. 11, as will have been observed, singled out the 'next and most lawful' friend of the intestate; who is interpreted to be the next of blood that is under no legal disabilities (*a*). But afterwards the statute 21 Hen. 8 (1529) c. 5, enlarged the power of the ecclesiastical judge, and permitted him to grant administration, either to the widow, or to the next of kin, or to both of them, at his own discretion; and, where two or more persons were in the same degree of kindred, gave the Ordinary his election to accept whichever he pleased.]

Upon this footing stood the law of wills and of administrations, down to the year 1857; although, in almost all other countries, these matters had come to be under the jurisdiction of the civil magistrates. And, in our own times, the opinion gradually obtained, that the subjects in question were not handled by the ecclesiastical courts as effectively, expeditiously, and cheaply, as the interests of justice required; which opinion at length led to the introduction, by Act of Parliament, of a new system, whereby the jurisdiction which these Courts had during some centuries enjoyed over wills and intestacies was wholly taken away. We are referring, of course, to the Court of Probate Act, 1857 (*b*), whereby the jurisdiction in the matter

(*a*) *Hensloe's Case* (1600) 9 Rep. 39. amended by 21 & 22 Vict. (1858) c. 95; 22 Vict. (1859) c. 30; and the Confirmation  
(*b*) 20 & 21 Vict. c. 77; c. 30; and the Confirmation

of wills and intestacies, so far as concerned personal estate, was directed to be thenceforth exercised by the Court of Probate, a new tribunal then created, of a secular character. And this jurisdiction was afterwards assigned to the Probate Division of the High Court of Justice by the Judicature Act, 1873 (*a*).

II. We shall now consider the manner and requisites of wills, regarded as dispositions of personal estate ; and under this head we propose to consider these four matters, namely—(1) the *capacity* to be a testator ; (2) the *solemnities* required for the will ; (3) the *appointment* of the executor ; and (4) the *probate* of the will.

1. *The capacity of persons to be testators.*—As we have seen (*b*), all persons are capable of being testators, save, of course, persons who labour under unsoundness of mind (whether total or partial, unless the partial insanity is shown not to have influenced the testator with respect to his will, or unless the will is made during a lucid interval) (*c*), or who by duress are restrained of their freedom of will, or who (as in the case of infants) are yet of immature will. As regards married women, they were, as a general rule, incompetent to make a will of personalty ; in which particular, our constitution differed materially from the civil law, according to which a married woman was fully competent to make a will (*d*). [Yet by her husband's licence, or with his *assent*, a married woman, even in England, might have disposed of her

of Executors (Scotland) Act, 1858, which relates to domiciled Scotchmen having pure personal estate in England.

(*a*) 36 & 37 Vict. c. 66, ss. 3, 34.

(*b*) *Ante*, bk. ii. pt. i. ch. xxii. (vol. i. pp. 456–458).

(*c*) *Smith v. Tebbitt* (1867) L. R. 1 P. & D. 398 ; *Banks v. Goodfellow* (1870) L. R. 5 Q. B. 549.

(*d*) Dig. 31, l. 77.

[personalty by will (a); for by such licence or assent he waived his own general right of administering to his wife's effects.

But this rule as to the incapacity of married women was subject to exceptions. And first, the Queen Consort might dispose of her chattels by will, even without the consent of the King (b). Second, any married woman might make her will of goods which were in her possession *in autre droit*, as executrix or administratrix (c). Third, a married woman might, under a *power* in that behalf conferred upon her, bequeath any property by will; her will in that case amounting to an appointment of the property in execution of the power (d). Fourth, a married woman having separate property in equity, could make a will in respect of it (e). Such will, however, if she survived her husband, was ineffectual, unless republished, to pass property acquired by her after his death (f).]

These exceptional provisions are, however, now chiefly of historical interest only; for at the present day a married woman has practically the same power of making a will as a man or a single woman. For the Married Women's Property Act, 1882, has made the whole of a married woman's property her separate property; except only the property acquired before 1883 of a woman married before that year. And the Married Women's Property Act, 1893, has provided, that the will of a married woman dying after the passing of that Act shall take effect as if executed immediately

(a) Bro. Abr. *Devise*, 34;  
*Tucker v. Inman* (1842) 4  
Man. & G. 1076; *Stevens v.*  
*Bagwell* (1808) 15 Ves. 153;  
*Re Atkinson* [1899] 2 Ch. 1.

(b) Co. Litt. 133.

(c) Godolph. I, 10.

(d) *Southby v. Stonehouse*  
(1755) 2 Ves. 610.

(e) *Peacock v. Monk* (1750)  
2 Ves. sen. 191; *Taylor v.*  
*Meads* (1864) 34 L. J. Ch. 203.  
(As to the nature of a married  
woman's 'separate estate,'  
see *post*, pp. 414-422.)

(f) *Willock v. Noble* (1875)  
L. R. 7 H. L. 580; *Dye v. Dye*  
(1884) 13 Q. B. D. 147.

before her death, whether she was or was not possessed of separate property at the time of making it ; and that such will shall not require to be re-executed or republished after the death of her husband (*a*). Her will is therefore now effectual to dispose of all property acquired by her at any time, whether before, or during the continuance of, the marriage, or after its termination ; with the sole exception of property acquired by her before 1883, in case she was married before that year.

With regard to infants, the incapacity to make a will in their case arises wholly from immaturity of age. The rule until 1837 was, that a male was competent to make a will of personal estate at the age of fourteen, and a female at twelve ; but neither of them at an earlier period (*b*). And this was also the regulation of the civil law. But it was expressly provided by the Wills Act, 1837, that the will of a person under twenty-one years of age should not be valid (*c*), with an exception for the wills of personalty of soldiers and sailors on active service (*d*).

2. *The solemnities required for the execution of a will.*—Formerly, a testament (as regarded personal property) might be either written or oral (otherwise called *nuncupative*) ; the former being published or declared by the testator as his written will, the latter being declared by the testator *in extremis* before a sufficient number of witnesses, and being only afterwards reduced into writing. But as nuncupative wills were liable to great impositions, and occasioned many surprises and perjuries, the Statute of Frauds (29 Car. 2

(*a*) 56 & 57 Vict. c. 63, s. 3 ; *Price* (1885) 28 Ch. D. 709.)  
*Re Wylie* [1895] 2 Ch. 116. It had been held, under the Act of 1882, that the rule laid down in *Willock v. Noble* (*ubi sup.*) still applied. (See *In re* (b) *Godolph.* pt. i. ch. viii. ; Went. 212 ; *Gilb. Eq.* 74.  
 (c) *Wills Act*, 1837, s. 7.  
 (d) *Ibid.* s. 11 ; *Re Hiscock* [1901] P. 78.

(1677) c. 3) laid them under many restrictions, except when made by mariners at sea or by soldiers on active service (*a*) ; and indeed surrounded them by so numerous a train of requisites, that the things themselves fell into disuse long before they were expressly abolished.

As regards written wills of personal estate, the general rule was, that no witnesses were required for their authentication (*b*) ; and if written in the testator's own hand (though it had neither his signature nor his seal, and although no witness had been present at its publication), the will was good, on proof of the handwriting merely (*c*). And even if written in another man's hand, and never signed by the testator, it was good ; on proof that the writing was according to the testator's instructions, and had been approved by him (*d*). In all which particulars, a will of personal estate differed very considerably from a will of real estate ; and eventually, therefore, the obvious improvement was introduced, of establishing one uniform rule, as regards solemnities and otherwise, for every will, whether of real or of personal estate. The Wills Act, 1837, accordingly requires, as we have seen (*e*), (i.) that every will and codicil shall be a written instrument, signed at the foot or end thereof by the testator (or by some other person in his presence and by his direction), (ii.) that such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and (iii.) that such witnesses shall attest and shall subscribe the will in the presence of the testator (*f*). But soldiers and sailors on active service may still validly make nuncupative wills of personalty (*g*).

(a) *Re Hiscock* [1901] P. 73.

(b) 2 Bl. Com. 501.

(c) Godolph. pt. i. ch. xxi. ;  
Gilb. Eq. 260.

(d) Comyn, *Dig.* 452-454.

(e) Vol. i. pp. 460, 461.

(f) Wills Act, 1837, s. 9 ;  
*Brown v. Skirrow* [1902] P. 3.

(g) *Gattward v. Knee* [1902]  
P. 99 ; *May v. May* [1902] P.  
103 ; *Re Scott* [1903] P. 243.

With reference to the form of a will made out of the jurisdiction of the English courts, or made within such jurisdiction by a person domiciled elsewhere, it has been enacted, by the Wills Act, 1861 (*a*), often called Lord Kingsdown's Act, but only as regards personal estate (which has been held for this purpose to include leaseholds (*b*)), that every will and other testamentary instrument made *within* the United Kingdom, by any British subject who shall die after the 6th August, 1861, shall be held to be well executed, and be admitted to probate—whatever may be the testator's domicile either at the time of making the will or at the time of his death—provided only it be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same was made (*c*). As regards a will made *outside* the United Kingdom by a British subject who shall die after the 6th August, 1861—whatever may be his domicile either at the time of making the will, or at the time of his death—such will will be held to be well executed for the purpose of being admitted to probate, provided only it be made according to the forms required, either by the law of the place where it was made, or of the place of the testator's then domicile, or of his domicile of origin, being within the British Empire (*d*). Importance is by these provisions attached to the testator's domicile, inasmuch as it is the domicile of a deceased intestate which in general determines the distribution of his personal estate (*e*). But no subsequent change of domicile will now render a will invalid; and this provision, unlike the two former, is not confined to the wills of British subjects (*f*). It should, however, be

(*a*) 24 & 25 Vict. c. 114.

(*b*) *Re Grassi* [1905] 1 Ch.

584.

(*c*) Wills Act, 1861, s. 2.

(*d*) *Ibid.* s. 1.

(*e*) *Dogliani v. Crispin*

(1866) L. R. 1 H. L. 301.

(*f*) 24 & 25 Vict. c. 114,

s. 3; *Re Groos* [1904] P. 269.



carefully noted, that Lord Kingsdown's Act is not concerned with the validity of the dispositions contained in a will, but merely with the forms or solemnities which must accompany the making of a will to render it a will at all.

3. *The appointment of the executor.*—In every will by which personal estate is bequeathed, an executor ought regularly to be appointed (a); although he is capable of being appointed either by express words or by clear implication (b). For the executor is he to whom the testator commits the execution of his last will and testament. All persons are capable of being executors who are capable of making wills, and many others besides; for infants—nay (it is said) even an infant *en ventre sa mère* (c)—may be made executors; likewise married women, although, in their case, the husband might formerly have refused to allow his wife to act, by reason of the liability which (prior to the Married Women's Property Act, 1882) he himself incurred for her conduct in the executorship (d)—a reason which has now ceased to exist (e).

4. *The probate.*—Although the executor's title dates from the death, and not from the probate (f), yet the probate is the authentication of the will; and such authentication is essential to the completion of any title to be made under the will to the personal estate (including chattels real) comprised therein (g). In

(a) *Went. Off. Ex.* ch. i.; *Graysbrook v. Fox* (1565) Plowd. 281.

(b) *Re William Bradley* (1883) 8 P. D. 215; *In the Goods of Kirby* [1902] P. 188. (An executor appointed by implication is called an executor according to the tenor.)

(c) *West. Symb.* p. 1, s. 635.

(d) *Pemberton v. Chapman* (1858) 1 El. Bl. & El. 1056.

(e) Married Women's Property Act, 1882, ss. 1, 18, 23, 24.

(f) *Com. Dig., Administration*, B. 10.

(g) *Doe v. Mew* (1837) 7 A. & E. 240; *Matson v. Swift* (1845) 8 Beav. 368.

which respect a will of personal estate formerly differed from a will of real estate ; no probate of the latter being required (*a*). But now, under the Land Transfer Act, 1897 (*b*), as regards the real estates (other than legal copyhold and customaryhold) to which the testator was entitled in fee simple for his own benefit, and under the Conveyancing Act, 1881 (*c*), as regards his trust and mortgage estates, the will must be admitted to probate, in order that the executor's title to these estates respectively may be authenticated ; and probate and letters of administration may now be granted in respect of real estate only, where there is no personal estate.

The executor, if he accepts the office—for of course he may in his discretion refuse to do so, that is to say, he may *renounce* probate (*d*)—is required to prove the will (*i.e.*, obtain probate of it) ; which, until the Court of Probate Act, 1857, was done before the Ordinary. Probate is either in *common form*, which is upon the executor's own oath ; or *per testes*, in more solemn form of law, which is only necessary when the proof is contested by the entry of some *caveat*. For, in the absence of any contest, the probate is granted *ex debito justitiæ* (*e*). And when the will is so proved, the original is deposited in the registry at Somerset House ; and a copy thereof on parchment is made and delivered to the executor, together with a certificate of its having been duly proved. And that official copy of the will is the *probate* thereof, as such term is commonly understood.

It is to be observed, however, that probate before

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|---|--|
| ( <i>a</i> ) <i>Barraclough v. Greenhough</i> (1867) L. R. 2 Q. B. 612. | Court of Probate Act, 1857, s. 79 ; 21 & 22 Vict. (1858) |
| ( <i>b</i> ) 60 & 61 Vict. c. 65, s. 1.                                 | c. 95, s. 16.  |
| ( <i>c</i> ) 44 & 45 Vict. c. 41, s. 30.                                | ( <i>e</i> ) Godolph. vol. i. ch. xx.                    |
| ( <i>d</i> ) <i>Venables v. East India Company</i> (1848) 2 Exch. 633 ; | s. 4 ; 3 Bl. Com. 98.                                    |

the Ordinary was, in general, the proper course, only in case all the goods of the deceased lay, at the time of his death, within one diocese. For if the deceased had *bona notabilia* (i.e., chattels to the value of a hundred shillings) in two distinct dioceses, then the will had to be proved before the Metropolitan of the province, by way of special prerogative (*a*); whence the courts of the Metropolitan wherein such will was proved, and the offices of such courts, were called respectively the 'prerogative courts,' and the 'pre-rogative offices,' of the provinces of Canterbury and York respectively. And, by means of such courts, the necessity for as many separate probates as there were dioceses was saved.

But, under the present system, the law as to *bona notabilia* is disused; the effect of the Court of Probate Act, 1857 (by which the jurisdiction of the ecclesiastical courts in these matters was taken away), being, that the whole jurisdiction and authority in relation to granting probates, and the depositing and preserving of the original wills, is now exercised without reference to the locality in which the property of the deceased may lie (*b*); though the distinction still obtains between proving a will in *common form*, and proving it in *solemn form* in a case of contention (*c*). For, though there are subordinate jurisdictions throughout the country, called District Probate Registries, appointed severally for the districts set forth in a schedule to the Act, and each of them presided over by a District Registrar; yet these are only branches of the central probate jurisdiction of the High Court,

(*a*) 4 Inst. 335; 2 Bl. Com. p. 509; *Gurney v. Rawlins* (1836) 2 M. & W. 87; *Easton v. Carter* (1850) 5 Exch. 8; and Ecclesiastical Jurisdiction Act, 1847 (10 & 11 Vict.

c. 98), s. 6.

(*b*) Court of Probate Act, 1857, s. 4.

(*c*) *Moore v. Holgate* (1866) L. R. 1 P. & D. 101; *Peacock v. Lowe* (1867) *ibid.* 311.

and, in general, at the option of the parties interested, a will may be proved, or administration granted, either in London, or in the registry of the district in which the deceased had, at the time of his death, a fixed place of abode. But if the grant involves any matter of contention, then recourse must be had to the principal court itself (*a*). For the purpose of obtaining a grant of probate in common form, the applicant must now usually lodge the original will, an engrossment thereof to constitute the probate, an affidavit of estate (including real estate), and an oath of executor, whereby he swears duly to administer.

And here we may conveniently observe, that even under the Court of Probate Act, 1857, a devise of real estate might also be authenticated by the probate of the will ; for if the will was proved in *solemn form*, then the probate was made conclusive evidence of the devise (*b*). And the Land Transfer Act, 1897 (*c*), now provides, that all enactments and rules of law relating to the effect of probate and letters of administration as respects chattels real, and as respects the dealings with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate, so far as the same are applicable, as if that real estate were a chattel vesting in them or him ; and it is now lawful, where probate is granted to one or some of several persons named as executors, power being reserved to the others or other to prove, for the proving executor or executors to make a sale, transfer, or disposition of real estate, without the authority of the Court (*d*).

(*a*) Court of Probate Act,  
1857, ss. 2, 46-48.

(*b*) *Ibid.* s. 62.

(*c*) S. 2 (2).

(*d*) Conveyancing Act, 1911,  
s. 12.

III. Our third head of inquiry is, the manner of granting *administration*. Until the change in the law to which we have already, more than once, adverted, if the deceased died intestate, then letters of administration were granted by the Ordinary, or else by the Metropolitan, according to the distinctions with respect to *bona notabilia* already stated. But the grant is now made under the provision for that purpose contained in the Court of Probate Act, 1857 (*a*); though, as to the person to whom the office of administrator is to be granted, the Court follows, except under special circumstances, the rules (*b*) which used to be obligatory also on the Ordinary. These rules are as follows.

[1. Administration of the goods and chattels of the wife must be granted to the husband or his representatives (*c*); and administration of the husband's effects must be granted to the widow or the next of kin. But the Court may grant it to either, or both, at its discretion (*d*). The Court prefers, however, a sole administrator (*e*); and will not, as a rule, pass over the widow (*f*).

2. Among the kindred, those are to be preferred that are the nearest in degree to the intestate. But of persons in equal degree, the Court may take which

(*a*) S. 4.

(*b*) S. 73; *In the Goods of Chapman* [1903] P. 192; *In the Goods of Brotherton* [1901] P. 139; *In the Goods of Jackson* [1902] W. N. 215. The fact that a husband has been convicted of murdering his wife is a 'special circumstance' by reason of which his legal personal representative will be passed over in an application for grant of administration to the estate of the wife (*In the Estate of Crippen* [1911] P. 108).

(*c*) *Johns v. Rowe* (1628)

Cro. Car. 106; Statute of Frauds (1677) s. 24; *Squibb v. Wyn* (1717) 1 P. Wms. 381.

(*d*) *Fawcett v. Fawcett* (1692) 1 Salk. 36; Stra. 532.

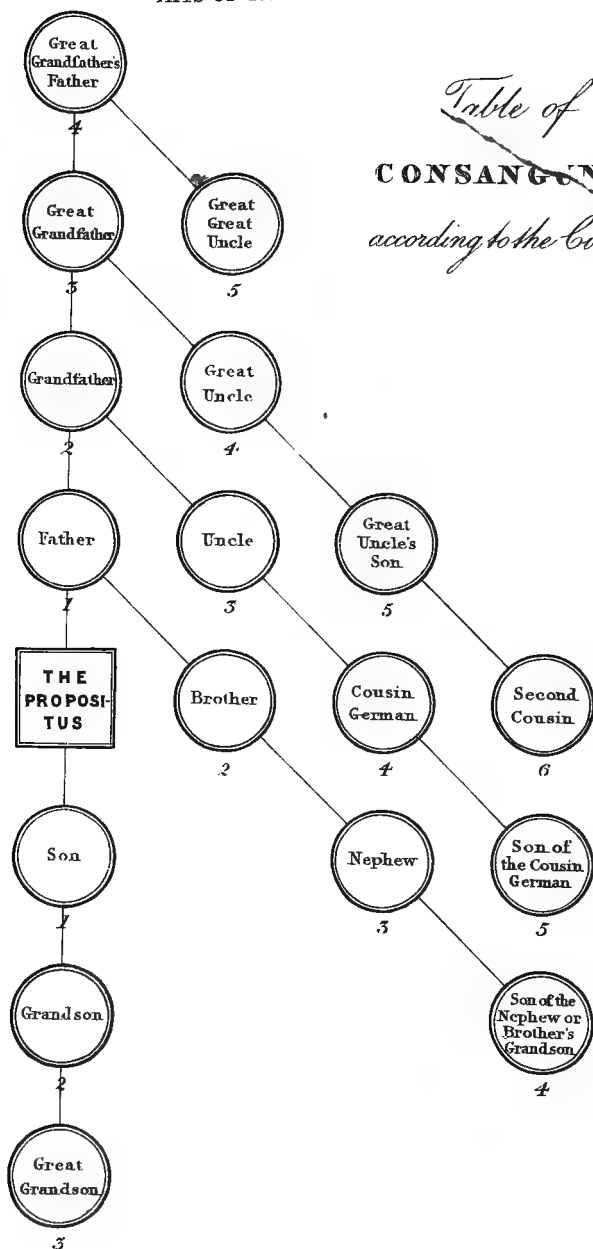
(*e*) *Re Newbold* (1866) L. R. 1 P. & D. 285.

(*f*) *Re Middleton* (1888) 14 P. D. 23; *In the Goods of Frost* [1905] P. 140. (Divorced spouses have no interest in each other's estate (*In the Estate of Wallis* [1905] P. 326).)



RIGHTS OF PROPERTY.—PT. 7

*Table of*  
**CONSANGUINITY**  
*according to the Civilians.*



[it pleases ; and in general it will prefer males to females (a).

3. This nearness or propinquity of degree is reckoned according to the computation of the civilians, as expressed in the annexed Table (b). And this computation allows one degree for each person in the line of descent, exclusively of him from whom the computation begins, and, in the direct line, counts the degrees from the deceased to his relative ; but between collaterals, the sum of the degrees from the deceased to the common ancestor, and from the common ancestor to the relative. In which computation the civil law differs (as regards collaterals) from the canonists ; who begin from the common ancestor and reckon downwards, and, in whatever degree either of the two persons, or the most remote of them, is distant from the common ancestor, consider them as related in that degree to each other (c). And, therefore, in the first place, the children or, (on failure of children) the parents of the deceased are entitled to the administration ; for though both children and parents are in the first degree, yet, with us, the children are allowed the preference (d). Then follow brothers and sisters (e), and after them grandfathers and grandmothers ; for though all these are in the second degree, yet we give the preference to brothers and sisters (f). After all these, come uncles and nephews (g), and the females of each class respectively ; and lastly, cousins.

(a) *Iredale v. Ford* (1859) *sup.*

1 Swab. & Trist. 305.

(b) *Mentny v. Petty* (1722) 1 P. Wms. 41 ; *Woodroff v. Wickworth* (1719) Prec. Chan. 527.  
 9 ; *R. v. Dr. Hay* (1767) 1 W. Bl. 641.

(c) Toller, *Executors*, 87–90 (2nd ed.).

(d) Godolph. pt. ii. ch. xxxv. ; Toller, *Executors*, *ubi*

(e) *Blackborough v. Davis* (1701) 1 P. Wms. 41 ; *Woodroff v. Wickworth* (1719) Prec. Chan. 527.

(f) *Evelyn v. Evelyn* (1753) 1 Amb. 191 ; 3 Atk. 762 ; Toller, *Executors*, 91.

(g) *Blackborough v. Davis*, *ubi sup.*



[4. The half-blood is admitted to the administration, as well as the whole ; for they are of the kindred of the intestate. And though, as we have seen (*a*), they were formerly excluded from the inheritance of *land*, yet this was upon feudal reasons only, which have nothing to do with personal estate. Therefore the brother of the half-blood shall exclude the uncle of the whole blood (*b*) ; and the Court might at its discretion grant the administration either to the sister of the half-blood or to the brother of the whole blood (*c*) ].

5. Again, no preference obtains in the matter of administration of personal estate between relatives *ex parte paternâ* and those *ex parte maternâ* ; but administration may be committed to either (*d*). As, however, letters of administration are now granted in respect of real estate, as well as, or even in default of, personal estate (*e*), the Land Transfer Act, 1897 (*f*), provides that on such grant regard shall be had to the rights of persons interested in the real estate of the deceased : and that his heir at law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin.

[6. If none of the kindred will take out administration, a creditor may do it (*g*).

7. And lastly, the Court may, in default of all these, commit administration to such discreet person as it approves of (*h*) ; or may grant him letters *ad colligenda*

(*a*) Vol. i. pp. 318–320.

(*b*) *Collingwood v. Pace* (1671) 1 Ventr. 424, per Hale, C.B.

(*c*) *Brown v. Wood* (1672) Aleyn, 36 ; Styl. 74.

(*d*) *Moor v. Barham* (1723) 1 P. Wms. 53.

(*e*) Land Transfer Act, 1897, s. 1 (3) ; *Re Barnett* [1898] P. 145 ; *Re Roberts*, *ibid.*

149.

(*f*) S. 2 (4).

(*g*) *Gidley v. Williams* (1701) 1 Salk. 38 ; *Re Bradshaw* (1887) 13 P. D. 18  
*In the Estate of Heerman* [1910] P. 357.

(*h*) *Davis v. Chanter* (1844) 14 Sim. 212 ; *Re Webb* (1888) 13 P. D. 71.

[*bona defuncti*, which makes him neither executor nor administrator—his only business (in that case) being to keep the goods in his custody (a), but not to dispose thereof, except in payment of debts and preservation of the estate (b).

If a bastard, who had no kindred, being *nullius filius*, or any one else that had no kindred, died intestate, and without wife or child, it was at one time held, that the Ordinary might seize his goods and dispose of them *in pios usus* (c). Later, the usual course, in such cases, was for any one who could establish a moral claim, to procure letters patent, or other authority from the Crown; and the Court would then grant administration to the person therein named (d).] But the present practice is, to grant administration to the Treasury Solicitor, or to his nominee, on behalf of the Crown (e); and any claim to the goods (whether legal or moral) must be established against him within a period of twenty years (f). And the like practice is applicable, when the Prince of Wales in right of his Duchy of Cornwall (g), or the King in right of his Duchy of Lancaster (h), becomes entitled to the goods of persons dying without next of kin.

In what has been stated on this subject, the administration granted is supposed to be a *general* one; as is always the case where the deceased dies wholly intestate, without making any will at all. [But it may happen, that he has made a will without naming any executor, or has named an incapable person; or that the executor may refuse to accept the office, or

- |                                     |                                    |
|-------------------------------------|------------------------------------|
| (a) Went. ch. xiv.                  | (f) Intestates Estates Act,        |
| (b) 2 Inst. 398; <i>Re Bolton</i> , | 1884, ss. 2, 3.                    |
| [1899] P. 186.                      | (g) <i>Re Griffith</i> (1884) 9    |
| (c) <i>Manning v. Napp</i> (1693)   | P. D. 63.                          |
| 1 Salk. 37.                         | (h) <i>Re Avar</i> (1886) 11 P.    |
| (d) <i>Jones v. Goodchild</i>       | D. 75; <i>In the Goods of Best</i> |
| (1729) 3 P. Wms. 33.                | [1901] P. 333.                     |
| (e) <i>Re Hartley</i> [1899] P. 40. |                                    |

[may himself die intestate before he has administered. In any of which cases, the Court will grant administration *cum testamento annexo*, to some other person ; in the choice of whom, it prefers the residuary legatee, if any such be nominated in the will, to the next of kin (*a*). And we are informed by Glanville, that this species of administration was in use so early as the reign of Henry the Second (*b*).

Again, if there be a sole executor under the age of twenty-one, a temporary administration, *cum testamento annexo et durante minore ætate*, may be granted to the guardian of such infant executor, or to such other person as the Court shall think fit (*c*).] For, by the Administration of Estates Act, 1798 (*d*), probate must not be granted to the infant executor himself, till he attains his majority ; though, if there be several executors named, and any of them be of full age, these latter may act without the co-operation of those under age (*e*). So also, a temporary administration may be granted *durante absentia*, as when an executor is out of the realm ; or *pendente lite*, as where a suit is commenced touching the validity of the will (*f*).

The title by administration differs from that by will in two respects. First, the administrator's title is derived solely from the grant of letters of administration, and dates only from such grant, not from the death (*g*) ; though, for some purposes, the grant when made relates back (*h*). In the interval between the

(*a*) *Pierce v. Perks* (1665) 1 Sid. 281 ; 1 Roll. Ab. 907 ; *In the Goods of Wilde* (1887) 13 P. D. 1 ; *In the Goods of Baldwin* [1903] P. 61.

(*b*) L. 7 cap. vi.

(*c*) *Veret v. Duprez* (1868) L. R. 6 Eq. 329 ; *Monsell v. Armstrong* (1872) L. R. 14 Eq. 423.

(*d*) 38 Geo. 3, c. 87, s. 6.

(*e*) Wms. *Exors.* 159 (10th ed.).

(*f*) Court of Probate Act, 1857, ss. 70–78 ; Court of Probate Act, 1858, ss. 18, 20.

(*g*) *Woolley v. Clark* (1822) 5 B. & Ald. 744.

(*h*) *Foster v. Bates* (1844) 12 M. & W. 226 ; *In the Goods of Pryse* [1904] P. 301.

death and the grant, the estate was, by the provisions of the Court of Probate Act, 1857 (*a*), vested in the Judge of the Court of Probate. It is uncertain what has been the effect on this enactment of the passing of the Judicial Acts (*b*).

Second, the title by administration never devolves from one person to another, by representative right. [For the interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor ; so that the executor of A.'s executor is, to all intents and purposes, the executor and representative of A. himself (*c*). And, however long may be the series of executors, the ultimate one is still the representative of A. Even where there are two executors, and one only of them proves (power being reserved to the other), and the proving executor dies, and the other, after due citation, does not appear, the executor of the proving executor continues the chain of the executorship (*d*). But the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A. (*e*). For the power of an executor is founded upon the special confidence and actual appointment of the deceased ; and a sole executor is therefore allowed to transmit that power to another, in whom he has equal confidence. But the administrator of A. is merely the officer of the Court, in whom the deceased has reposed no trust at all ; and therefore, on the death of that officer, it results back to the Court, to appoint another. Also, the administrator of A.'s executor has clearly no privity with or relation to A. ; being only commissioned to administer the effects of the intestate executor, and not of the

(*a*) Court of Probate Act, 1857, s. 79 ; Act of 1858, s. 16. 1858, s. 19.

(*b*) See Judicature Act, [1896] P. 129.

(*c*) 25 Edw. 3 (1352) st. 5, 7.  
c. 5 ; Court of Probate Act,

(*d*) *In the Goods of Reid*

(*e*) Bro. Ab. *Administrator*,

[original testator. Wherefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the Court to commit administration afresh, of such of the goods of the deceased as have not been administered by the former executor or administrator. Any such administration is called an administration *de bonis non* ; and the administrator so appointed is called an administrator *de bonis non* (a). And such an administrator may, as well as an original administrator, have but a limited or special administration committed to his care, *e.g.*, an administration limited to certain specific effects, such as a term of years, or the like (b).]

Every person to whom administration is granted must, in addition to the affidavit of estate and oath, give a bond (and, if so required, with one or more sureties (c) ) conditioned for duly collecting and administering the estate ; and if the condition of the bond be broken, the bond is assigned by the Court to some person to be chosen for the purpose, who sues thereon in his own name, and recovers, as trustee for the parties interested, the full amount recoverable thereon (d).

IV. Our last general head of inquiry involves the consideration of some of the chief points relative to the office of an executor or an administrator. And we

(a) Such a grant can be made where the original administrator cannot be found and is believed to be dead (*In the Estate of Saker* [1909] P. 233).

(b) 1 Roll. Abr. 908 ; Godolph. pt. ii. ch. 30 ; *Re Butler* [1898] P. 9.

(c) Sureties were dispensed with in *The Goods of Best*

[1901] P. 333 ; *The Estate of Harper* [1909] P. 88 ; *The Goods of Paton* [1901] P. 188.

(d) Court of Probate Act, 1857, ss. 81–83 ; Act of 1858, s. 15 ; *Sandrey v. Mitchell* (1863) 3 B. & S. 405 ; *In the Goods of Young* (1866) L. R. 1 P. & D. 186.

will, in the first place, refer to the well-known principle applicable without distinction to both executors and administrators; namely, that, in all matters in which the personal estate is concerned, they represent the person of the testator or intestate, as the heir (prior to the Land Transfer Act, 1897) used to do that of his ancestor (*a*). And they, together with the heir of a deceased party, were formerly described as his *real and personal representatives*; but now, by that Act, the executor or administrator is constituted real as well as personal representative of the deceased. So that the executor or administrator has the same property in the lands and chattels of the deceased (excepting his legal copyholds) as the deceased himself had when living; and, in general, succeeds to his rights of action, and is subject, so far as the assets will extend, to his liabilities (*b*). And this title of the executor will override even the title of a specific devisee or legatee. But it is to be particularly noted, that upon contracts made by himself, although in his representative capacity, the executor is personally liable (*c*), with a right to recoup himself out of the estate in so far as the liability is properly incurred in the administration (*d*). Executors who have proved a will can now make a title to the real estate of the deceased, without the concurrence of their co-executor who has not proved (*e*). The powers conferred on the executors and administrators by the Land Transfer Act, 1897 (*f*), do not affect the bene-

(*a*) Co. Litt. 209.

(*b*) 4 Edw. 3 (1330) c. 7;  
3 & 4 Will. 4 (1833) c. 42.

(*c*) *Ashby v. Ashby* (1827)  
7 B. & C. 444; *Prior v. Hem-*  
*brow* (1841) 8 M. & W. 873;  
*Evans v. Evans* (1887) 34 Ch.  
D. 597; *Hobbs v. Wayet* (1887)  
36 Ch. D. 256.

(*d*) *Dowse v. Gorton* [1891]  
A. C. 190; *Brooke v. Brooke*

[1894] 2 Ch. 600; *Re Ray-*  
*bould* [1900] 1 Ch. 199.

(*e*) Conveyancing Act, 1911,  
s. 12. (As to the earlier law,  
see *Re Pawley and London,*  
*&c. Bank* [1900] 1 Ch. 58, and  
*Re Cohen's Exors. and L. C. C.*  
[1902] 1 Ch. 187.)

(*f*) 60 & 61 Vict. c. 65,  
s. 2 (1).

ficial interests of the persons claiming under the will or intestacy.

[The duties incumbent upon executors and administrators respectively are, moreover, very much the same ; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration ; and, second, that an executor may do many acts before he proves the will (a), being acts proper for an executor to do (b), while an administrator may do nothing till letters of administration are issued (c). For (as already stated) the former derives his power from the will and not from the probate ; while the latter owes his power entirely to the appointment of the Court. But, once the letters of administration are, in fact, granted, they also will relate back to the death, so far as acts done for the benefit of the estate are concerned (d) ; and so as to enable the administrator to sue for a wrong done to the estate by a stranger before the grant of administration (e).

If any person takes upon him to act in the affairs of the deceased, without any just authority—as by intermeddling with his goods—he is called in law an executor *de son tort* ; and is liable to all the trouble of an executorship, without any of its indemnities or advantages (f). But merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse, will not amount to such an intermeddling as will charge a man as executor of his own wrong (g).

(a) Wentw. ch. iii. ; *Whitehead v. Taylor* (1839) 10 A. & E. 210.

(b) *Re Moore* (1888) 13 P. D. 36.

(c) *Lucy v. Walrond* (1837) 3 Bing. N. C. 841.

(d) *Morgan v. Thomas* (1853) 8 Exch. 302.

(e) *Foster v. Bates* (1844) 12 M. & W. 226

(f) 43 Eliz. (1601) c. 8 ; *Meyrick v. Anderson* (1850) 14 Q. B. 726 ; *Sykes v. Sykes* (1870) L. R. 5 C. P. 113 ; *In re Lovett* (1876) 3 Ch. D. 198 ; *Attorney-General v. New York Breweries* [1898] 1 Q. B. 205.

(g) *Stokes v. Porter* (1558) Dyer, 166 ; *Serle v. Waterworth* (1838) 4 M. & W. 9.

[An executor *de son tort* cannot himself bring an action in right of the deceased. But actions may be brought against him (*a*), and he is chargeable with the debts of the deceased, so far as assets come to his hands (*b*); though, as against creditors in general, he is allowed all payments made to any other creditor in the same or a superior degree, himself only excepted (*c*). And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages (*d*); unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt (*e*).

We shall now proceed to enumerate the specific powers and duties of an executor; premising only that what is here stated as to the executor, applies in general to an administrator also. And these powers and duties are as follows:—

1. He must bury the deceased in a manner suitable to the estate which he leaves behind him; the necessary funeral expenses being allowed before all other debts or charges (*f*). But if he be extravagant, or misapply the assets, in this or in any other particular, such a misapplication is a *devastavit*, that is to say, a devastation or waste of the substance of the deceased; and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased (*g*), who may bring actions against him to make him personally

(*a*) Bro. Ab. *Administrator*, 8; *Rowsell v. Morris* (1873) L. R. 17 Eq. 20.

(*b*) *Stokes v. Porter*, *ubi sup.*; *Job v. Job* (1877) 6 Ch. D. 562; *Re Mary Mellor* (1883) 8 P. D. 108.

(*c*) *Coulter's Case* (1598) 5 Rep. 30; *Curtis v. Vernon* (1790) 3 T. R. 587; *Thompson v. Harding* (1853) 2 El. & Bl. 630.

(*d*) *Padget v. Priest* (1787) 2 T. R. at p. 100.

(*e*) Wentw. ch. xiv.

(*f*) *Bisset v. Antrobus* (1831) 4 Sim. 512; *Corner v. Shew* (1838) 3 M. & W. 356.

(*g*) *Shelley's Case* (1694) 1 Salk. 296; Godolph. pt. ii. ch. xxvi. s. 2; *Camden v. Fletcher* (1838) 4 M. & W. 378.



[responsible for any loss which they may have suffered by such conduct (a).]

2. He must, in the next place, prove the will of the deceased, or (as it is otherwise expressed) take out *probate*; and, in default of any will, the person entitled to be administrator must also, at this period, take out *letters of administration*.] In order to obtain probate of the will or letters of administration, he is required to pay a certain stamp duty on the amount of the personal estate. This duty was formerly called 'probate duty'; and was denoted by a stamp impressed on the probate or letters of administration. But now under the Finance Act, 1894, and the Finance (1909–1910) Act, 1910 (b), the duty payable is called 'estate duty,' which, in the case of all persons dying after the 2nd day of August, 1894, is a percentage upon the value of all property *real or personal* passing on the death of the deceased; the rate of this duty varying according to the total amount of the property passing. But the old exemption of estates under 100*l.* is continued; and estates under 300*l.* pay a fixed duty of 30*s.*, and estates under 500*l.* a fixed duty of 50*s.* (c). The nature and incidence of this duty have been more fully explained in the chapter on death duties in the first volume of this work (d).

3. [The executor may be required to make an *inventory* of all the goods and chattels; or, in other words, of all the personal estate, including the chattels real, whether in possession or in action, of the deceased. And this inventory he is to deliver into the court, upon oath, if and when thereunto lawfully required (e).]

This requirement is now represented by the necessity

(a) *Lacons v. Wormall* (d) See *ante*, vol. i. pp. 561–  
[1907] 2 K. B. 350; *Re Blow* 572.

[1913] 1 Ch. 358; (1913) 30 (e) 21 Hen. 8 (1529) c. 5;  
T. L. R. 117. *Griffiths v. Antony* (1836) 5

(b) Act of 1910, s. 54.

A. & E. 623.

(c) Act of 1894, s. 16.

of specifying in appropriate accounts annexed to the Inland Revenue affidavit the property in respect of which estate duty is payable upon the death of the deceased ; in order to obtain probate or administration. Such accounts must include even real estate and other property passing on the death of the deceased, not forming part of the deceased's personal estate (a) ; although the duty thereon will not necessarily be paid by the executor or administrator. Moreover, in an action for the administration of the estate by the Court, which class of actions is assigned to the Chancery Division, an executor or administrator may be called upon to render an account, upon oath, of all that he has actually received in respect of the estate, or (where the account ordered is ' upon the footing of wilful default ' ) would, but for his wilful default, have received.

4. [He is to *collect* all the goods and chattels of the deceased ; and, to that end, is to bring actions, if necessary, against all persons who withhold them (b).] And, inasmuch as all the real and personal estate of the deceased, other than legal copyholds, whether in possession or in action, is now assets in the hands of the personal representative, and liable as such to pay the creditors of the deceased (c), the executor is allowed to sell so much of the estate as does not already consist of money, in order to answer the demands that may be made upon him. On this subject we may remark, that if there be two or more executors who have proved the will, a sale, receipt, or release by one of them will, in general, be good against all the rest (d) ; save that, by the specific rules

(a) Finance Act, 1894, s. 8 3 A. & E. 839 ; *Webb v.*  
 (3) ; Land Transfer Act, 1897, *Adkins* (1854) 14 C. B. 401.  
 s. 2 ; *Re Sharman* [1901] 2 (c). Land Transfer Act,  
 Ch. 280. 1897, s. 2 (3).  
 (b) *Farley v. Briant* (1839) (d) *Anon.* (1537) *Dyer*, 23 b.

of certain corporations (*e.g.*, the Bank of England), the concurrence of all the executors may be sometimes required to the transfer of the stock standing in the name of the deceased (*a*). This power of one or more of the executors, without the concurrence of the other or others, to do acts binding the estate, ceases when the executors are *functi officio*; although they may still hold some of the property of the deceased in the character of trustees (*b*). It would seem, also, that, where two or more executors have proved the will, the concurrence of all who have proved is still required in a sale or transfer of real estate which has vested in them by virtue of the Land Transfer Act, 1897, unless the sanction of the Court has been obtained (*c*). But in the rare case of joint administrators, *e.g.*, where a grant of administration was made to the next of kin and the heir, neither can act without the other, as regards either real or personal estate (*d*).

5. [He must pay the *debts* of the deceased; and in payment of debts must observe the rules of priority, according to the several degrees which the law has established in this matter, though he may, in his discretion, pay a debt which is barred by the Statutes of Limitation (*e*). And, first, he must pay all funeral charges, and the expense of proving the will, and the like; second, debts due to the Crown, by record or specialty (*f*); third, such debts as are, by particular

(*a*) 33 & 34 Vict. (1870) c. 71, s. 23.

(*b*) *Attenborough v. Solomon* [1913] A. C. 76.

(*c*) Cf. *Re Pawley and London, &c. Bank* [1900] 1 Ch. 58; Land Transfer Act, 1897, s. 2 (2); Conveyancing Act, 1911, s. 12.

(*d*) *Hudson v. Hudson* (1737) 1 Atk. 460.

(*e*) *In re Greaves* (1881) 18 Ch. D. 551.

(*f*) *Skrogs v. Gresham* (1585) 1 And. 129. It has been held that a simple contract debt due to the Crown is not to be preferred to a specialty debt due to a private person (*Re Bentinck* [1897] 1 Ch. 673). But *quære* whether this is consistent with

[statutes, to be preferred to all others, *e.g.*, income tax, poor rates, debts due from the estate of an officer of a Friendly Society to the Society, and the like (*a*); fourth, debts of record, such as debts due on judgments against (*b*), and recognizances by (*c*), the deceased] (and amongst debts of this degree are to be reckoned also decrees in equity and orders in bankruptcy (*d*)) ; fifth, all other debts *pari passu*—whether they are on simple contract or whether they arise or are secured by any bond, deed, or other instrument under seal, or otherwise made or constituted specialty debts (*e*). And although, under the Real Estate Charges Acts (*f*), mortgage debts and liens for unpaid purchase-money are now primarily charged on the estate comprised in the mortgage or purchase ; that is no exemption to the executor or administrator from the duty of seeing that these debts are paid, or at all events provided for (*g*).

[Among debts of equal degree, the executor, if a creditor of the testator, is allowed to pay himself first, by retaining so much of the legal assets in his hands (*i.e.*, actually or constructively in his posses-

*Re Samson* [1906] 2 Ch. 584 (see *post*, p. 335).

(*a*) Friendly Societies Act, 1896, s. 35 ; Preferential Payments in Bankruptcy Act, 1888, s. 1 (6).

(*b*) The Law of Property Amendment Act, 1860, ss. 3, 4, required registration of judgments as a condition of priority. But these sections are now repealed by the Land Charges Act, 1900, s. 5 ; and, by s. 2 (3) of that Act, judgments cannot now be registered without leave of the Court. (See note (*e*) on

p. 335, *post*.)

(*c*) *Sadlers' Case* (1588) 4 Rep. at p. 60, where it is said that judgments rank in priority to recognizances.

(*d*) *Shafto v. Powell* (1694) 3 Lev. 355 ; *Morrice v. The Bank of England* (1736) 3 Swanst. 573.

(*e*) Administration of Estates Act, 1869 ; *Shirreff v. Hastings* (1877) 6 Ch. D. 610.

(*f*) Acts of 1854, 1867, and 1877, respectively.

(*g*) *Bowles v. Hyatt* (1888) 38 Ch. D. 609.

[sion (a)) as his debt amounts to (b), which right is called his right of *retainer*; the executor being, in that particular, different from the heir, who is not entitled to retain his debt (c). It would seem that, for this purpose, specialty debts and simple contract debts must now be treated as being of equal degree (d), and that an executor may even retain his own debt against a debt of a higher degree, of which he was ignorant when he made a *bonâ fide* and regular distribution of the estate (e). But an executor of his own wrong is not allowed to retain, for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and besides, would be permitting them to take advantage of their own wrong, which is contrary to the policy of the law (f).] Moreover, although an administrator is, generally speaking, entitled to retain his own debt, in the same way as an executor (g), an administrator to whom administration has been granted as a creditor of the deceased, is prevented from exercising this right, so as to give himself preference over other creditors, by the form of the administration bond into which he is compelled to enter as a condition of obtaining the grant (h). Nor can the executor retain his own debt out of any but *legal* assets; and the Land Transfer

(a) *Pulman v. Meadows* Ch. 562.  
[1901] 1 Ch. 233.

(b) *Glaholm v. Rowntree*  
(1837) 6 A. & E. 710; *Campbell v. Campbell* (1880) 16 Ch. D. 198; *Norton v. Compton* (1885) 30 Ch. D. 15.

(c) *Davidson v. Illidge*  
(1883) 24 Ch. D. 654; 27 Ch. D. 478.

(d) *In re Jennes* (1909) 53 Sol. Jo. 376; *Olpherts v. Coryton* [1913] 1 I. R. 211.

(e) *Re Fludyer* [1898] 2

(f) *Coulter's Case* (1598) 5 Rep. 30.

(g) *In re Belham* [1901] 2 Ch. 52. But an administrator who is an undischarged bankrupt cannot retain (*Wilson v. Wilson* [1911] 1 K. B. 327).

(h) See Form 59 in Appendix V. to Tristram and Coote, *Probate Practice*; and Practice Note [1899] W. N. 262.

Act, 1897, has not extended his right so as to enable him to retain out of the real estate of the deceased (a).

Also, among several creditors of equal degree, none of whom have obtained judgment against the executor, the executor may pay any creditor in preference to the other or others, preferring even a simple contract debt to one secured by an instrument under seal (b); which right is called his right of *preference*. But if one of such creditors shall have obtained judgment against the executor, he shall be first paid, who shall first obtain judgment; for the executor or administrator cannot resist the action on the ground that nothing will be left for the other creditors (c). But he may resist it, on the ground that there is not enough to pay some creditor of higher degree, if there should be any such. Which latter defence he is *bound* to make, if he have notice that a higher debt is outstanding (d); for otherwise, on a deficiency of assets, he must answer for it out of his own estate. And of all debts of record, he has notice by construction of law (e).

If an executor, after exhausting, in a due course of administration, the whole assets which have come to his hands, be afterwards sued by a creditor remaining unpaid, he is entitled to defend himself by proving that he has fully administered the assets; and this is called the defence of *plene administravit* (f). Upon

(a) *Re Williams* [1904] 1 Ch. 52.

(b) *Re Samson* [1906] 2 Ch. 584.

(c) *In re Marvin* [1905] 2 Ch. 490.

(d) *Anon.* (1537) Dyer, 32; *Corbet's Case* (1590) 2 Leon. 60; *Sawyer v. Mercer* (1787) 1 T. R. 690.

(e) *Littleton v. Hibbins* (1601) Cro. Eliz. 793. (This rule was restricted to docketed

judgments by 4 & 5 W. & M. (1692) c. 20; revived absolutely by the Judgments Acts, 1838 and 1839 (see *Fuller v. Redman* (1859) 26 Beav. 600); again restricted to registered judgments by the Law of Property Amendment Act, 1860, ss. 3, 4; and (*semble*) again revived in its entirety by the Land Charges Act, 1900, ss. 2 (3) and 5.)

(f) *Palmer v. Waller* (1836)

this defence being proved, the creditor is only entitled to judgment for payment of his debt and costs out of any future assets that shall come to the defendant's hands ; that is to say, to judgment out of assets *quando acciderint*. But executors (including administrators) have now been further protected in the administration of estates ; for, under the Law of Property Amendment Act, 1859, in the case of leases subject to onerous rents and covenants, they may obtain protection against all liability for such rents and covenants on assigning the lease to a purchaser, and following in other respects the course pointed out by the Act (a) ; and, under the same Act, on giving the prescribed notices to creditors and others, they are enabled safely to distribute the assets among the parties entitled, without liability for any debts of which they have not received notice (b). But for debts of which they have notice, even though such debts be only future or contingent, they cannot escape liability except by a decree of the Court in an administration action, authorising them to distribute the estate (c).

[6. When the debts are all discharged, the *legatees* claim, and are entitled, to be next paid. And they are to be paid by the executor so far as the assets will extend ; the legacy or (in certain cases) succession duty being first paid thereon. But the executor may not, if a legatee, give himself any such preference as in the case of debts (d) ; and, although it was formerly thought that the appointment of one of the testator's debtors as executor extinguished the debt due from the

1 M. & W. 689 ; *Dawson v.* [1911] 2 Ch. 530).

*Gregory* (1845) 7 Q. B. 757.

(b) *Ibid.* s. 29.

(a) 22 & 23 Vict. c. 35, ss.

(c) *Re Nixon* [1904] 1 Ch.

27, 28. But a person who is paid money for taking over

638 ; *Re Mary King* [1907] 1 Ch. 72.

the lease and indemnifying the executor is not a purchaser for this purpose (*In re Lawley*

(d) *Fretwell v. Stacey* (1702) 2 Vern. 434 ; *A.-G. v. Robins* (1722) 2 P. Wms. 25.

[executor to the estate, it is now settled that it is a question of the testator's intention in each such case (a).

It will be convenient to consider here some particular rules of law regarding legacies.

A legacy is a bequest by will of goods or chattels, including chattels real, and moneys to arise from a sale of real estate directed by will, or charged by will upon real estate. Every bequest of goods or chattels transfers to the legatee, on the death of the testator, an inchoate property in that which is given; but his interest therein is not perfect without the assent of the executor. For if I am entitled to receive a pecuniary legacy of 100*l.*, or a specific one of a piece of plate, I cannot in either case take the legacy without the consent of the executor, in whom all the chattels are in the first instance vested (b); and it is his business to see whether there is a sufficient fund to pay all the debts of the testator (c), or, as Bracton expresses the sense of our antient law, *de bonis defuncti primo deducenda sunt ea quæ sunt necessitatis, et postea quæ sunt utilitatis, et ultimo quæ sunt voluntatis* (d).

Also, in case of a deficiency of assets, all the general pecuniary legacies must *abate* proportionately; nay, even if the legatees have been paid, they must refund a rateable part, in case debts come in afterwards, which more than exhaust the residue after legacies paid (e). Which law also is as old as Bracton and Fleta; who tell us, *si plura sint debita, vel plus legatum fuerit, ad quæ catalla defuncti non sufficient, fiat ubique defalcatio, excepto regis privilegio* (f). However, a specific legacy of a piece of plate, or of a horse,

- (a) *Re Applebee* [1891] 3 Ch. M. & W. 684.  
 422; *Re Pink* [1912] 2 Ch. 529. (d) L. 2, cap. 26.  
 (b) Co. Litt. 111; *Richards* (e) *Newman v. Barton*  
*v. Browne* (1837) 3 Bing. N. C. (1690) 2 Vern. 205.  
 493. (f) Bract. l. 2, cap. 26;  
 (c) *Smith v. Day* (1837) 2 Fleta, l. 2, cap. 57, s. 11.



[or the like, is not to abate at all, unless there be not sufficient without such abatement to pay the debts of the deceased (a)]; but, on the other hand, a specific legacy is liable to *ademption*, which arises where the thing so bequeathed is afterwards destroyed, or disposed of in some other manner by the testator himself before his death. And where a specific legacy is thus adeemed, the legatee has no longer any claim under the will (b).

[Also, if the legatee die before the testator, the legacy is in general lost or *lapses*, and shall sink into the residue ;] but by a provision in the Wills Act, 1837, previously explained at length, an exception to this rule has been introduced, in cases where the bequest is to a child, or other issue of the testator, for any estate or interest not determinable at or before the death of the legatee, and the legatee leaves issue, who survive the testator. In such a case, if no intention to the contrary appears on the face of the will, the legacy takes effect as if the legatee had died immediately after the testator (c).

[If a *contingent* legacy be left to any one, as when he shall attain, or if he attain, the age of twenty-one, and he die before that time, it is a lapsed legacy, even though he survive the testator (d); but a legacy to one 'to be paid' when he attains the age of twenty-one years, is a *vested* legacy—an interest, that is to say, which, as to title, commences *in præsentia*, although it be *solvendum in futuro*. And if the legatee in such a case die under age, his representatives shall in general receive it out of the testator's personal estate, at the time at which it would have been payable if the legatee had lived (e). But if such a legacy is charged

(a) *Webb v. Webb* (1689) 2 xxii. vol. i. pp. 467, 468.  
Vern. 111.

(b) *In re Gibson* (1866) L. R. (d) *Dame Latimer's Case*  
(1545) Dyer, 59; *Onslow v.*  
2 Eq. 669. *South* (1710) 1 Eq. Cas. Ab. 295.

(c) *Ante*, bk. ii. pt. i. ch. (e) *Onslow v. South*, *ubi sup.*

[upon real estate, it shall lapse for the benefit of the heir ; unless there be something further in the will, sufficient to show a contrary intention (*a*). And note, that if a pecuniary or 'general' legacy, due immediately, be charged on land, interest, at the rate of four per cent. per annum, will be payable thereon from the testator's death (*b*). But if not so charged, it will only carry interest from the end of the year after the death of the testator ; for that is the time generally allowed by law for the payment of legacies (*c*). On the other hand, a specific legacy of an income-bearing fund (say of stock) carries with it the dividends or income as from the death (*d*).]

There is another species of contingent legacy ; as where personal estate is bequeathed to A., and upon his dying *without issue*, then over to B. This expression was formerly considered as importing an indefinite failure of issue ; and the bequest over, as being too remote and tending to a perpetuity, was consequently held to be void. But a contrary rule was established by the Wills Act, 1837 (*e*), as more fully explained in the chapter on devises (*f*) ; for by that rule, this expression is now to be construed (unless a contrary intention appear on the face of the will) as importing a failure of issue in the lifetime or at the death of A. And such a bequest over as that just mentioned will, consequently, now be good as an executory limitation.

7. [When all the debts and legacies are discharged and paid, and the duties on the legacies are also paid, and the residuary accounts have been duly passed by

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| ( <i>a</i> ) <i>Duke of Chandos v. Talbot</i> (1731) 2 P. Wms. 601 ; | <i>ubi sup.</i>  |
| <i>Evans v. Scott</i> (1847) 1 H. L. C. 43 ;                         | ( <i>d</i> ) <i>Kirby v. Potter</i> (1799) 4 Ves. 751 ;                  |
| <i>Henty v. Wrey</i> (1882) 21 Ch. D. 332.                           | <i>Barrington v. Tristram</i> (1801) 6 Ves. 349.                         |
| ( <i>b</i> ) <i>Maxwell v. Wettenhall</i> (1722) 2 P. Wms. 26, 27.   | ( <i>e</i> ) S. 29.  |
| ( <i>c</i> ) <i>Maxwell v. Wettenhall</i> ,                          | ( <i>f</i> ) <i>Ante</i> , bk. ii. pt. i. ch. xxii. vol. i. pp. 470-471. |

[the executors, then the surplus, or residue, must be paid to the residuary legatee appointed by the will ; or if there be none, then to the next of kin of the deceased. For although it was long a settled notion, that such surplus devolved to the executor's own use, by virtue of his executorship (*a*), that doctrine was always understood as subject to this restriction, that wherever there was sufficient, on the face of the will, to show that the executor was not intended to have the residue, it should go to the next of kin. And it has now been provided generally, by the Executors Act, 1830 (*b*), that unless it shall positively appear by the will that the executor was intended to have the residue, he shall be deemed to be a trustee of it for such persons as would have been entitled, had the testator died intestate, to claim it as his next of kin ; so that now the executor is entitled to such residue or surplus, only in the absence of any next of kin (*c*). But an administrator has no right to any part of the estate of the deceased for his own benefit, even in the absence of next of kin ; for in that case the Crown will take the personal estate as *bona vacantia* (*d*).

8. The Statute of Distribution (*e*) was passed with reference to the case of an *intestacy*, and to provide for the residue of the estate which remained after payment of the dead man's debts ; for here, too, it was formerly much doubted whether the administrator could be compelled to make any distribution of the surplus (*f*). By that Act, as explained by the Statute of Frauds (*g*), it was provided, that the surplusage of intestates' estates—except in the case of *femes covert*,

(*a*) Perkins, 525.

(*b*) 11 Geo. 4 & 1 Will. 4,  
c. 40.

(*c*) *Re Bacon's Will* (1886)

31 Ch. D. 460 ; *Re Roby*  
[1908] 1 Ch. 71 ; *A.-G. v.*

*Jeffreys* [1908] A. C. 411.

(*d*) *Hensloe's Case* (1600) 9

Rep. 38 b.

(*e*) 22 & 23 Car. 2 (1670)

c. 10.

(*f*) Godolph. pt. ii. ch.

xxxii.

(*g*) 29 Car. 2 (1677) s. 24.

[the administration and enjoyment of whose estates belonged, by the principles of the common law, to their husbands—shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner. One third shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if they are dead, to their representatives, that is their lineal descendants. If there are no children or lineal descendants of such children subsisting, then a moiety is to go to the widow, and a moiety to the next of kindred in equal degree, and their representatives. If there is no widow, the whole is to go to the children and their representatives ; if neither widow nor children, the whole is to be distributed among the next of kin in equal degree and their representatives ; but, among collaterals, no representatives (as such) are to be admitted, farther than the children of the intestate's brothers and sisters (a).

The next of kin here referred to are to be ascertained by the same rules of consanguinity, as those which indicate who are entitled to letters of administration ; of which we have already sufficiently spoken (b). And, therefore, according to the Statute of Distribution, the father, or, if he were dead, the mother, succeeded to all the personal effects of their children who died intestate and without wife or issue, to the exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father ; but by the statute 1 Jac. 2 (1685) c. 17, if a man die intestate and without issue, leaving no father, but leaving a mother and brothers or sisters, the mother, and each of the brothers and sisters, or their representatives, shall divide his effects in equal portions ; subject, of

(a) *Carter v. Crawley* 25.  
 (1683) Sir T. Raym. 496 ; (b) See *ante*, p. 321.  
*Pett's Case* (1700) 1 P. Wms.

[course, to the rights of his widow, if any. Moreover grandparents, though in the same degree as brothers and sisters of the deceased, will be postponed to them, and to children of such brothers and sisters, provided that any of such brothers or sisters survive (a) ; but the next of kin of the half-blood will be admitted equally with those of the whole blood of equal degree, and in preference to the whole blood of more remote degree.

By another provision of the Statute of Distribution, it is enacted that no children of the intestate (except his heir at law) on whom he may have settled in his lifetime any estate in lands or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters ; but that, if the estate so given them by way of advancement shall not be equivalent to the other shares, the children so advanced shall have so much as will make them equal (b)—a just and equitable provision said to be derived from the *collatio bonorum* of the Roman law, which it certainly resembles in some points, though it differs widely from it in others (c). And it may not be amiss here to observe, that this doctrine of advancement, with regard to goods and chattels, commonly known by the homely title of ‘hotchpot,’ was part of the antient custom of London (d), of the province of York, and of the kingdom of Scotland (e).

It must be particularly observed also, with regard to the Statute of Distribution, that personal estate, unlike real estate, is sometimes divided *per capita*, and sometimes *per stirpes*. Thus, personal estate is divided *per capita*—to every man an equal share—when all the

(a) *Evelyn v. Evelyn* (1754)  
3 Atk. 762.

(b) *In re Ford* [1902] 2 Ch.  
605. (But see *Re Roby* [1908]  
1 Ch. 71.)

(c) Dig. 37, 6, 1.

(d) *Kemps v. Kelsey* (1722)  
Prec. Ch. 596.

(e) *Ersk. Inst.* b. 3, tr. 9,  
s. 24.

[next of kin claim in their own rights, as in equal degree of kindred, and not *jure repræsentationis*, as in the right of another person. For example, if the next of kin be the intestate's three brothers, A., B., and C.; here his effects are divided into three equal portions, and distributed *per capita*, one to each. But if one of these brothers, A., had been dead, leaving three children, and another, B., leaving two, then the distribution must have been *per stirpes*, viz., one-third to A.'s three children, another third to B.'s two children, and the remaining third to C., the surviving brother. But if C., in the case supposed, had also been dead, without issue, then A.'s and B.'s children, being all in equal degree to the intestate, would take in their own rights *per capita*; viz., being five in all, each of them one-fifth part (a).] However, as regards the issue of the intestate, the distribution is in all cases *per stirpes*, and not *per capita*; e.g., if A. dies intestate leaving three grandchildren by his son B., and one grandchild by his daughter C., the one moiety of the estate goes to the three children of B., and the other moiety to the one child of C. (b).

By the Statute of Distribution, the customs of the city of London, of the province of York, and of all other places having peculiar customs of distributing intestates' effects, were expressly excepted and reserved; so that in those places, even after the restraint on testamentary disposition had been long removed, their antient customs, with respect to the estates of *intestates*, still remained in full force (c). Any special customs, however, concerning the distribution of estates in these or other places, have now been wholly abolished; save only with respect to the

(a) *Walsh v. Walsh* (1695) *Vade* (1741) Barn. Ch. 444.  
 Prec. Chan. 54. (c) *Matthews v. Newby*  
 (b) *In re Natt* (1888) 37 Ch. (1682) 1 Vern. 133.  
 D. 517, following *Lockyer v.*

estates of those who may have died on or before the 31st December, 1856. For, by the 19 & 20 Vict. (1856) c. 94, the distribution of the personal estate of all persons dying intestate on or after the 1st January, 1857, is directed to take place as if the rules for the distribution of the personal estates of intestates generally prevalent in the province of Canterbury, prevailed throughout the whole of England and Wales; any law, custom, or statute to the contrary notwithstanding. And, though this statute has been repealed by the Statute Law Revision Act, 1892, the rule of law thus established has not been altered.

Another amendment of the law of distribution has been introduced by the Intestates' Estates Act, 1890. For, in the case of a husband who dies intestate after the 1st September, 1890, and who leaves no issue, the whole estate (real and personal) of the deceased now passes to his widow, if it be under a total value of 500*l.*; and where such estate exceeds that value, she now takes 500*l.* out of it, in proportion to the value of the realty and personalty respectively, in priority to all persons entitled under the Statute of Distribution (*a*). But, subject to these special provisions in the widow's favour, the residue of the personal estate is distributable according to the former law; that is to say, one half to the widow and the remaining one half among the next of kin.

9. In conclusion, it is necessary to say something on the subject of *legacy duty*. This duty, as opposed to estate duty (which is a tax on the property passing on the death of the deceased), is a tax on interests in purely personal estate derived from such property, whether by *donatio mortis causâ*, or by way of legacy or residuary gift under a will, or as the share to which the

(*a*) *Duret v. Charrière* [1908] 2 Ch. 500; *In re* [1896] 1 Ch. 912; *In re Heath Manser* [1910] W. N. 61. [1907] 2 Ch. 270; *In re Cuffe*

taker is entitled upon intestacy. As a rule this duty is payable in addition to the estate duty. It will be convenient in what follows to speak of the benefit taken as a legacy, and of the beneficiary as a legatee ; though the duty is equally payable on a share under an intestacy. The following are the most important points relating to this duty :—

(i.) *The nature of the interest in respect of which duty is payable.*—The interest must (as already stated) arise by *donatio mortis causâ*, or by will, or on intestacy. Thus, succession and not legacy duty is payable by persons taking an interest by way of succession in personal property settled by deed ; and this is so, even where the beneficiary takes under the exercise by will of a *special* power of appointment created by deed. Where, however, a *general* power (whether created by deed or will) is exercised by will, the interest is regarded as arising under the will ; and legacy duty is payable (a). Again, the interest must be an interest in purely personal estate. And thus chattels real (b), and moneys to arise from a sale of real estate directed by will to be sold, or charged by will upon real estate (c), are not regarded as personal estate ; and therefore succession duty, and not legacy duty, is payable on them. But estates *pur autre vie* applicable by law in the same manner as personal estate (d), real property impressed in equity with the character of personal property (such as real property belonging to a partnership (e) ), and moneys directed to be applied in purchase of real

(a) Revenue Act, 1845, s. 4 ; *Re Cholmondeley* (1832) 1 Cr. & M. 149. (For the distinction between 'general' and 'special' powers, see *ante*, vol. i. pp. 437–438.)

(b) Succession Duty Act, 1853, s. 19.

(c) Customs and Inland Revenue Act, 1888, s. 21 (2).

(d) Legacy Duty Act, 1796, s. 20.

(e) *Forbes v. Steven* (1870) L. R. 10 Eq. 178 ; *Stokes v. Ducroz* (1890) 38 W. R. 535.



estate, but not yet so applied (a), are liable to legacy duty as personal estate.

(ii.) *The rate of legacy duty.*—This varies according to the nearness of relationship between the deceased and the legatee. Thus, if the legatee is husband or wife, or a lineal descendant or lineal ancestor, of the deceased, the rate is 1 per cent. ; where the legatee is a brother or sister, or a descendant of a brother or sister, 5 per cent. ; and in all other cases 10 per cent. (b). If the husband or wife of a legatee is more nearly related to the deceased than the legatee, duty is payable according to the nearer relationship (c).

(iii.) *Exemptions from legacy duty.*—The following are the principal cases in which no legacy duty is payable :—

(a) where the legatee is the husband or wife of the deceased (d) ;

(b) where the legatee is the lineal descendant of the deceased, and the property is chargeable with estate duty upon the death, or the legacy takes effect out of settled property, and estate duty has been paid at any time since the date of the settlement (e) ;

[But the exemptions (a) and (b) are now, if the deceased died on or after 30th April, 1909, confined to the following cases :—

(i.) where the principal value of the property passing on the death of the deceased (with certain exceptions) does not exceed 15,000*l.* ;

(ii.) where the value of all legacies or successions derived by the legatee from the same deceased or predecessor does not exceed 1,000*l.* ;

(a) Legacy Duty Act, 1853, s. 11.  
1796, s. 19.

(b) Stamp Act, 1815,  
Schedule ; Finance (1909–  
1910) Act, 1910, s. 58.

(c) Succession Duty Act,

(d) Stamp Act, 1815,  
Schedule.

(e) Finance Act, 1894,  
ss. 1, 5.

[(iii.) where the legatee is the widow or infant child of the deceased, and the value of all legacies or successions derived by the legatee from the same deceased or predecessor does not exceed 2,000*l.* (*a*)] ;

(c) where the value of the real and personal property of the deceased in respect of which estate duty is payable does not exceed 1,000*l.* (*b*) ;

(d) where the whole value of the personal property of the deceased does not exceed 100*l.* (*c*) ;

(e) legacies to members of the Royal Family (*d*) ;

(f) legacies of books, prints, and specific articles given to bodies corporate and institutions for preservation (*e*) ;

(g) specific (but not pecuniary) legacies under the value of 20*l.* (*f*) ;

(h) plate, furniture, and other specific articles not yielding income given to persons by way of succession, so long as they do not pass to a person having power to dispose thereof (*g*) ;

(i) objects of national, scientific, historic, or artistic interest, whether settled or not, until sold (*h*) ;

(j) money left to pay duty on other property (*i*).

(*a*) Finance (1909 – 1910) Act, s. 58.

(*b*) Finance Act, 1894, s. 16 (3).

(*c*) Customs and Inland Revenue Act, 1880, s. 13.

(*d*) Stamp Act, 1815, Schedule.

(*e*) Legacy Duty Act, 1799, s. 1.

(*f*) Stamp Act, 1815, Schedule ; Customs and Inland Revenue Act, 1881, s. 42.

(*g*) Legacy Duty Act, 1796, s. 14.

(*h*) Finance Act, 1896, s. 20 ; Finance (1909–1910) Act, 1910, s. 63.

(*i*) Legacy Duty Act, 1796, s. 21.

## CHAPTER VIII.

OF SOME MIXED OR IRREGULAR SUBJECTS OF  
PROPERTY.

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WE have thus taken a general survey of the law of property, under its two great heads of 'real' and 'personal.' These, as we have seen, are strongly distinguished from each other; not only as regards the natural qualities of immobility on the one hand, and mobility on the other, but also as regards the legal incidents to which each class is respectively liable. There are, however, in the law of property, some few cases of a mixed character, with the consideration of which we will close the second Book of these Commentaries; that is to say, there are things real which are attended with some of the incidents of things personal, and there are things personal which are attended with some of the incidents of things real.

Among things real which have some of the legal incidents of things personal, we shall consider (1) emblements, (2) fixtures, and (3) shares.

1. *Emblements* are, as we have previously said (a), the growing crops annually produced by the labour of the cultivator. All vegetable growths, until they are actually severed from the soil, are, of course, in legal contemplation, part of the realty, not less than the soil itself; but, upon severance, they change their character, and are converted into personalty (b).

(a) *Ante*, bk. ii. pt. i. ch. iv.  
vol. i. pp. 162-163.

(b) *Re Ainslie* (1885) 30  
Ch. D. 485.

They are consequently governed, when in the first predicament, by those rules, as to estate and title, which are incident to things real; but when in the second predicament, they are governed by the rules which attach to things personal. Thus trees, while still implanted in the ground, are parcel of the freehold, and as such will pass, on the death of the owner of the inheritance, to the heir or devisee; but when felled or blown down, they become part of his personal estate, and belong, on his decease, to his personal representatives on behalf of his next of kin or legatees. To this general doctrine, however, emblements or *fructus industriales* are an exception; for these, even while still in union with the soil, follow, in several particulars, the nature of personal, as distinguished from real estate.

For, in the first place, as we have seen (*a*), emblements may lawfully be severed from the soil, and removed by the tenant whose industry has produced them, or his representatives, on the termination of his tenancy; provided that such termination was caused by an event which he cannot be reasonably held to have foreseen. It is not necessary to dwell any further on this point, which has been fully dealt with in an earlier chapter (*a*).

In the second place, upon the death of a terre-tenant seised in fee, the emblements growing on his land at the time of his decease will not pass to the heir, but to the personal representatives of the deceased terre-tenant; for which the reason seems to be, that they were sown with the intention of being reaped by himself, and of thus being ultimately converted into or forming part of his personal estate (*b*). And now that, in cases of inheritance,

(*a*) *Ante*, bk. ii. pt. i. ch. iv.  
vol. i. pp. 162-165.

(*b*) 1 Wms. *Exors.* (10th  
ed.) s. 39.

descent is traced, not from the person last seised, but from the last purchaser, the reason for the rule would appear to be still stronger than before. The law, however, makes a distinction between an heir and a devisee. For the devise to, a man of a particular piece of land will, unlike a descent, suffice to carry with it the emblements growing thereon at the testator's decease (a).

Thirdly, the emblements of a terre-tenant are subject, like his movables, to be distrained upon for any arrears of rent that he may owe his landlord. Formerly, indeed, this was otherwise; for, at common law, the emblements of a tenant were considered, for this purpose, as part of the freehold, and as such, not distrainable. But by the Distress for Rent Act, 1737 (b), landlords are empowered to take and seize, as a distress for arrears of rent, all sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever, growing upon any part of the demised premises; and the same to cut and lay up, preparatory to a sale, either upon the premises, or, if there be no convenient storing-place thereon, upon other land.

Finally, in case of a judgment against the terre-tenant, his emblements are liable to be taken upon a writ of *fiery facias*; and this, not as the result of special statute, but simply because of the similarity which exists, in other particulars, between the law of personal property and the law of emblements (c).

2. *Fixtures* may be defined as things of an accessory character, annexed to houses or lands; and they include not only such matters as grates in a house, or steam-engines in a colliery (which follow in some respects the law of personal chattels), but such things also as windows and palings, which are for every pur-

(a) *Cooper v. Woolfitt*  
(1857) 2 H. & N. 122.

(b) S. 8.

(c) *Evans v. Roberts* (1826)  
5 B. & C. at p. 832; *Re Woodham* (1887) 20 Q. B. D. 40.

pose parcel of the realty. To be a fixture, however, the thing must not constitute a part of the principal subject-matter itself; *e.g.*, the walls or floors of a house, being an intrinsic part of a house, are never described as fixtures. And yet the fixture must be in some union or connection with the principal subject-matter, and not merely brought into contact with it; as in the case of a picture suspended on hooks against a wall, or a wooden barn resting, by its weight alone, upon a brick foundation (*a*).

By an antient rule of the common law (the result, perhaps, of that paramount regard which in former times was paid to land as compared with personal chattels), every fixture, or thing annexed to the realty, became, immediately on the annexation, part of the realty itself; the maxim being, *quicquid plantatur solo, solo cedit* (*b*). The application of this maxim meant that, in general, the fixture was thereafter governed by the same law which applied to the land with which it was incorporated, and that it ceased altogether to follow the law applicable to personal estate. There are, however, numerous cases in which the contrary is now true, and in which the fixture now retains, after its annexation, the quality of a personal chattel; reason and convenience seeming to require that, with regard to them, the old common law rule should be qualified. And, accordingly, we find the law to be:—

First, as between a tenant in fee's heir (or devisee) and his personal representatives, the fixtures will in general follow the land; even such of them as have been put up merely for ornament or domestic use will pass to the real representative, inasmuch as they are not capable of removal without material damage

(*a*) *Elwes v. Maw* (1802) 3 East, 55. (But see *Norton v. Dashwood* [1896] 2 Ch. 497.)      (*b*) *Re Ainslie* (1885) 30 Ch. D. 485.

to the freehold, and are essential to its enjoyment, if not in its natural, at least in its acquired or factitious, character (*a*). And the same rule seems to apply also, as between these parties, to such fixtures as have been placed or erected for purposes connected with trade (*b*).

Second, as between the tenant of a particular estate and the person entitled in remainder, though in general the former is bound to commit no waste, but to keep the inheritance entire and unimpaired, yet it would seem that trade fixtures, and also ornamental or domestic fixtures, if put up by himself, may be lawfully removed by him, or by his personal representative, as the case may be; and that either during the continuance of his estate, or on its determination (*c*).

But, as between mortgagors and mortgagees, the old common law rule still asserts its predominance, and even trade fixtures are in general esteemed parcel of the realty, whether expressly mentioned in the mortgage, or not (*d*); although in the Bills of Sale Acts, 1878 and 1882, which require registration of a mortgage of personal chattels, fixtures are undoubtedly treated as being, for the purposes of registration, mere personal chattels (*e*).

(*a*) *D'Eyncourt v. Gregory* (1866) L. R. 3 Eq. 382; *Norton v. Dashwood* [1896] 2 Ch. 497; *In re Whaley* [1908] 1 Ch. 615; *In re Lord Chesterfield* [1911] 1 Ch. 237.

(*b*) *Fisher v. Dixon* (1845) 12 Cl. & F. 312; *In re Seton-Smith* [1902] 1 Ch. 717.

(*c*) *Hill v. Bullock* [1897] 2 Ch. 482 (stuffed birds); *In re De Falbe* (No. 2) [1901] W. N. 87 (statuary); *Leigh v. Taylor* [1902] A. C. 157 (tapestry); *In re Hulse* [1905]

1 Ch. 406 (machinery).

(*d*) *Climie v. Wood* (1868) L. R. 3 Ex. 257, 4 Ex. 328; *Longbottom v. Berry* (1869) L. R. 5 Q. B. 123; *Reynolds v. Ashby* [1904] A. C. 466. (As to the rights of an equitable mortgagee, see *In re Samuel Allen & Sons* [1907] 1 Ch. 575; *In re Morrison, Jones and Taylor* (1913) 29 T. L. R. 474.)

(*e*) *Hobson v. Gorringe* [1897] 1 Ch., at p. 189; *Monti v. Barnes* [1901] 1 K. B. 205.

Even chattels bought by the mortgagor, and brought upon and affixed to the mortgaged land, whether before or after the mortgage, will, in the absence of special circumstances, pass to the mortgagee in whom the land is vested ; even though the seller has reserved his property therein until the price therefor is paid (a). For the title to chattels may clearly be lost by being affixed to real property by a person who is not owner of the chattels (b). Yet in some cases it has been held that chattels so affixed do not pass to the mortgagee ; either because an agreement was implied between the mortgagee and the mortgagor, authorising the latter to bring in such fixtures as were necessary to his trade, and to agree with the owners as to their removal, or because the affixing was not such as to cause the chattels to cease to be chattels (c). And where, after a mortgage, the mortgagor leases the premises, the lessee's right to remove fixtures erected by himself is not affected by the mortgage ; and the mortgagee therefore cannot treat such fixtures as comprised in his security (d).

Thirdly, as between landlord and tenant, it is held that the latter, though guilty in general of waste if he despoils the freehold, may nevertheless take away during the continuance of his term—but not (unless by permission) after he has quitted the premises (e)—such fixtures as he has himself put up, either for the purposes of trade, or for the ornament or furniture of the premises demised (f) ; and of course, the legal

(a) *Hobson v. Gorrings*, *ubi sup.* ; *Reynolds v. Ashby* [1904] A. C. 466.

(b) *Reynolds v. Ashby*, *ubi sup.*, at p. 475.

(c) *Cumberland Bank v. Maryport Iron Co.* [1892] 1 Ch. 415 ; *Gough v. Wood* [1894] 1 Q. B. 713 ; *Lyon v.*

*London, &c. Bank* [1903] 2 K. B. 135.

(d) *Sanders v. Davis* (1885) 15 Q. B. D. 213.

(e) *Leader v. Homewood* (1858) 5 C. B. (N.S.) 546 ; *Re Lavies* (1877) 7 Ch. D. 127.

(f) *Wilde v. Waters* (1855) 16 C. B. 637 ; *Elliot v. Bishop*



representative of the tenant (including his trustee in bankruptcy) has the like right of removal (*a*). But this right does not extend to erections of such a nature, that their removal would be of material detriment to the freehold; for these latter fall under the general rule, and not under the exception, and must consequently be yielded up to the landlord, at the end of the term, as parcel of the inheritance (*b*). A tenant may lose his right to remove fixtures by surrendering the demised premises and accepting a new tenancy (*c*).

A tenant's right to remove fixtures did not extend, at common law, to things annexed to the realty for purposes merely agricultural. But, by the Landlord and Tenant Act, 1851 (*d*), if a tenant of a farm or lands (with the consent in writing of his landlord), at his own expense, erects any building or machinery, either for agricultural or trade purposes, being under no previous obligation to do so, such erection remains the property of, and is removable by, the tenant; though, in removing it, he is not to injure the premises demised. The landlord may, however, on receiving notice, elect to purchase the fixture, at a value to be ascertained by two referees or their umpire. Also, more recently, by the Agricultural Holdings Act, 1908 (*e*), re-enacting similar provisions contained in earlier statutes on the same subject, it has been enacted, but only as regards the holdings affected by the Act, that where a tenant affixes to his holding any engine, machinery, fencing,

(1855) 11 Exch. 113; *Lambourn v. McLellan* [1903] 2 Ch. 268.

(*a*) *In re Walker* (1884) 13 Q. B. D. 454; *In re Moser* (1884) *ibid.* 738.

(*b*) *Buckland v. Butterfield* (1820) 2 Brod. & Bing. 54.

(*c*) *Leschallas v. Woolf* [1908] 1 Ch. 641. (As to the

effect of a landlord re-entering for non-payment of rent, when property let on hire to the tenant by a third person has been fixed to the freehold, see *British Economical Lamp Co. v. Empire, Mile End* (1913) 29 T. L. R. 386.)

(*d*) S. 3.

(*e*) S. 21.

or other fixture, or erects any building for which he is not, under the Act or otherwise, entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, or where the tenant has, since 1883, acquired such fixture or building, then such fixture or building shall be the property of, and be removable by, the tenant, before, or within a reasonable time after, the termination of the tenancy. But—(1) before the removal of the fixture or building, the tenant is to pay all rent, and to satisfy all his other obligations to the landlord in respect of the holding; (2) in the removal, he is not to do any avoidable damage to the holding; (3) immediately after the removal, he is to make good all the damage occasioned to the holding by the removal; (4) he is not to remove the fixture or building without giving one month's previous notice in writing to the landlord of his intention to remove it; whereupon (5) at any time before the expiration of the notice, the landlord, by counter-notice in writing given by him to the tenant, may elect to purchase the fixture, and thereupon it is to be left by the tenant, and becomes the property of the landlord, he duly paying therefor the price thereof, as agreed between them, or, failing such agreement, as ascertained by valuation.

Fourthly, with regard to the rights of an execution creditor to seize and sell fixtures under a writ of *fiery facias*, the rule appears to be, that, upon a *fiery facias* issued against the tenant for years, who is entitled to remove them, the fixtures may be seized and sold under such writ (a); but upon the like writ issued against the tenant of the freehold, they are exempt from the operation of any such process (b). But fixtures are not

(a) *Poole's Case* (1703) 1 Salk. 368.

(b) *Winn v. Ingilby* (1822) 5 B. & Ald. 625.

ordinarily subject to a distress for rent (a) ; at least in cases where they cannot be restored, after removal, in the like plight and condition (b).

3. *Shares in public undertakings connected with land.*—As we have previously seen, in the chapter on estates held in co-ownership (c), an undivided share in real estate itself, as a rule, follows the nature of the property in which it is held. Upon this principle, shares held in any of the numerous public undertakings, such as mines, canals, and railroads, which are immediately and principally concerned with the acquisition and user of land, ought to be treated as things real. And in fact, when such shares were first introduced, they were so treated. Thus, the shares in the famous New River Company, founded in the reign of James the First, have always been regarded as real estate (d) ; and, in the year 1799, the Court declared a share in the undertaking known as the ‘ Bath Navigation ’ also to be of that character (e). But, in recent years, there has been a decided tendency to reverse this policy. Thus, by the Companies Clauses Act, 1845 (f), and by the Companies (Consolidation) Act, 1908 (g), the shares in all companies incorporated under those Acts are made personal estate ; and, in the cases to which these Acts do not apply, it has long been usual to provide, by the documents of incorporation, that the shares in the undertaking shall be regarded as personalty for all purposes. Such statutory provisions have been held sufficient to prevent the shares in undertakings governed by them from

(a) Co. Litt. 47 b ; *Gorton v. Falkner* (1792) 4 T. R. 565.

(b) *Darby v. Harris* (1841) 1 Q. B. 895 ; *Hellawell v. Eastwood* (1851) 6 Exch. 295 ; *Provincial Billposting Co. v. Low Moor Iron Co.* [1909] 2 K. B. 344.

(c) See *ante*, bk. ii. pt. i. ch. ix. (vol. i. pp. 229–242.)

(d) *Davall v. The New River Co.* (1849) 3 De G. & S. 397.

(e) *Howse v. Chapman* (1799) 4 Ves. 544.

(f) S. 7.

(g) S. 22 (1).

being treated as real estate within the operation of the Statutes of Mortmain (a) ; and this rule has been confirmed by the Mortmain and Charitable Uses Act, 1891, which enacts (b) that the word 'land,' in that and the principal Act of 1888, shall not be deemed to include 'money secured on land or other personal 'estate arising from or connected with land.'

We now approach the consideration of those things personal which are, for certain purposes, treated by our law as having the character of real estate. And of these the chief examples are : (1) title-deeds, (2) heir-looms, and (3) animals *feræ naturæ*.

1. *Title-deeds*, including charters, court-rolls, and other evidences of the title to lands, together with the chests in which they are contained, pass together with the inheritance, and go not to the executor (c). And the reason is, because such documents are necessary to the well-being of the inheritance, and so pass with it, as parcel of the freehold ; and their custody is with the legal freeholder, although he should be only entitled to the lands for his life (d). But where title-deeds have been deposited by the owner as a security for money lent, they are chattels in the hands of the mortgagee ; and his special property in them will pass, on his decease, to his personal representative (e).

2. [*Heir-looms* are such goods and personal chattels as, by special custom, pass upon death to the heir along with the inheritance, and not to the executor of

(a) *Edwards v. Hall* (1855) 6 De G. M. & G. 74, overruling *Tomlinson v. Tomlinson* (1823) 9 Beav. 459 ; *Ware v. Cumberlege* (1855) 20 Beav. 503.

(b) S. 3.

(c) Bro. Ab. tit. *Chattels*, 18 ; Co. Litt. 6 a ; Com. Dig.

*Biens*, B ; *Charters*, A ; *Wright v. Robotham* (1886) 33 Ch. D. 106.

(d) *Allwood v. Heywood* (1863) 1 H. & C. 745 ; *Leathes v. Leathes* (1877) 5 Ch. D. 221.

(e) *Shep. Touch.* 469. (And see now *Conveyancing Act*, 1881, s. 30.)

[the last proprietor. The termination, 'loom,' is of Saxon original, in which language it signifies a limb or member; so that an heir-loom is nothing else but a limb or member of the inheritance. As a general rule, heir-looms are such things as cannot be taken away without damaging or dismembering the freehold; but, under the denomination of heir-looms, even carriages, pictures, utensils, and other household implements, may be included, provided the custom to include them be strictly proved (*a*). The antient jewels of the Crown are also said to be heir-looms (*b*); and all such descend upon the heir, or other the person entitled to the inheritance for a freehold estate therein, whereas all chattels personal whatsoever, other than those of this peculiar character, vest in the personal representatives of the deceased owner (*c*). Also, it is said, that heir-looms, though mere chattels, cannot be devised away from the inheritance by will, even by the tenant in fee simple. For though the owner might, during his life, have sold or disposed of them, as he might of the timber of the estate, since, as the inheritance was his own, he might mangle or dismember it as he pleased; yet, they being at his death instantly vested in the heir, the devise of them, which is subsequent, and not to take effect till after his death, is postponed to the custom, whereby they have already descended (*d*).

Other personal chattels there are, which also descend to the heir in the nature of heir-looms; as a monument or tombstone in a church, or the coat-armour of his ancestor there hung up, with the pennons and other ensigns of honour, suited to his degree. In this case, albeit the freehold of the church is in the parson, and

( <i>a</i> ) Co. Litt. 18 b, 185 b.;	( <i>b</i> ) <i>Ibid.</i> 18 b.
<i>Pusey v. Pusey</i> (1684) 1 Vern.	( <i>c</i> ) <i>Ibid.</i> 388.
273; <i>Hill v. Hill</i> [1897] 1	( <i>d</i> ) <i>Ibid.</i> 185 b.
Q. B., at pp. 494–495.	

[these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from the heir (*a*). Pews in a church are somewhat of the same nature ; which may descend by custom immemorial from the ancestor to the heir (*b*).]

Once more, the term ‘heir-looms’ is applied, in ordinary speech, in a still wider sense, so as to include, for example, pictures, plate, furniture, and the like, directed by will or settlement to follow the limitations, thereby made, of some family mansion or estate. But the word is not then employed in its strict and proper meaning ; nor is the disposition itself, beyond a certain point, effectual. For the articles will, in such a case, belong absolutely to the first person who, under the limitations, would take a vested estate of inheritance in them, supposing them to be real estate. And the person so becoming entitled to them may clearly dispose of them by his will ; and if he die intestate, they will pass to his personal representative, and not to his heir (*c*).

3. *Animals feræ naturæ* (such as deer in a real authorised park, fishes in a pond, doves in a dove-house, &c.) are ranked as parcel of the freehold, by the general law of the realm ; because they are necessary to the well-being of the inheritance (*d*). And when they are confined upon a man’s estate, but not domesticated, they pass, if he were seised of an estate of inheritance,

(*a*) Co. Litt. 18 ; *Corven’s Case* (1613) 12 Rep. 105.

(*b*) *Corven’s Case*, *ubi sup*.

(*c*) *Gower v. Grosvenor* (1740) 5 Madd. 337 ; *Barnard. Ch. Rep.* 54 ; *Lord Scarsdale v. Curzon* (1859) 1 J. & H. 40 ; *In re Hill* [1902] 1 Ch. 807. But, subject to the rule against perpetuities, it is possible to provide that they

shall not vest in a tenant in tail until he is entitled in possession, and that, in the case of a tenant in tail dying under twenty-one, his title shall be divested (*In re Lord Chesham* [1909] 2 Ch. 329). But see *In re Parker* [1910] 1 Ch. 581.

(*d*) 2 Bl. Com. 427.

to the heir or devisee ; and if he were possessed for a term of years, they pass to his executor or administrator (a). But if domesticated, they become goods and chattels, equally with animals naturally tame ; in which latter case, they belong, in every instance, on the death of the owner, to his personal representative.

(a) Co, Litt. 8 a ; *Liford's Case* (1614) 11 Rep. 50 ; *Morgan v. Abergavenny* (1849) 8 C. B. 768.

## BOOK III.

### OF RIGHTS IN PRIVATE RELATIONS.

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#### CHAPTER I.

##### OF MASTER AND SERVANT.

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WE now proceed to consider the rights of persons in their private relations, the principal relations in private life being—

- (1) the relation of *master and servant* ;
- (2) the relation of *husband and wife* ;
- (3) the relation of *parent and child* ; and, incidentally to the latter,
- (4) the relation of *guardian and ward*.

First, the relation of MASTER AND SERVANT.—Slavery, it need hardly be said, does not, and cannot (*a*), exist in England, or, in fact, in any of the territories which are within the King's dominions (*b*). But the English law sanctions and upholds the mere obligation of service ; the engagement, that is to say, of a man or woman, free to contract, to enter into the service of another, for such period as may be mutually agreed upon. Even a contract to serve for life is not invalid (*c*).

(*a*) *Smith v. Brown* (1706) Salk. 666 ; *Somerset's Case* (1772) 11 St. Tr. 340 ; Lofft, 1. (And see 3 & 4 Edw. 6 (1550) c. 16.)

(*b*) Slavery Abolition Act, 1833, s. 12.

(*c*) *Wallis v. Day* (1837) 2 M. & W. 273.



But a contract of personal service will not be specifically enforced ; and it is not competent to the parties to attach thereto any servile incidents, such as unlimited rights of personal control and correction (a).

We will first deal with certain classes of servants, and the peculiar rules relating to their service.

*Menial servants* are so called from living *intra mœnia*, within the house or its curtilage ; such are a domestic servant, a coachman or groom, a gardener living in a house within his master's grounds (b). Although it is usual to engage such servants at a fixed amount of wages by the year, there is generally no express stipulation as to the time that the service is to last. In such cases the hiring is thus understood, that it is by the year ; but that either party may at any time determine it at pleasure, upon giving a month's notice, for which a month's wages are considered as an equivalent (c). This is, however, only a presumption, which may be rebutted by evidence of a contrary intention (d). And a custom to go at the end of the first month of service, on giving notice during or at the end of the first fortnight, is good, if proved by sufficient evidence ; but it is not so notorious that the Court must take notice of it in the absence of such evidence (e). A clerk or governess is not a servant ; and he or she, if engaged without express agreement as to time, cannot be dismissed (save for misconduct) without a reason-

(a) *Davies v. Davies* (1887) 36 Ch. D., at p. 393.

(b) *Nowlan v. Ablett* (1835) 2 C. M. & R. 54.

(c) *Nowlan v. Ablett, ubi sup.* ; *Gordon v. Potter* (1859) 1 F. & F. 644. The servant is not entitled to any compensation for loss of board and lodging (*Gordon v. Potter, ubi sup.*).

(d) *Lilley v. Elwin* (1848)

11 Q. B. 742 ; *Fairman v. Oakford* (1860) 5 H. & N. 635.

(e) *Moult v. Halliday* [1898] 1 Q. B. 125. (But see *George v. Davies* [1911] 2 K. B. 445, where it was held that a county court judge might take judicial notice of a custom for either party to determine the service at the end of the first month by a fortnight's notice.)

able notice ; though such notice need not necessarily expire at the end of the current year of the service (a). For it may be taken, with regard to the time at which the notice must expire, that there is no inflexible rule of law on the subject, but that each case must depend on its own circumstances (b).

A domestic servant may be dismissed on the ground of misconduct or wilful disobedience at any time, and without either notice or payment of wages, in the same way as any other servant ; and in such a case the servant will not be entitled to any wages, even in respect of the time which has elapsed since the last proper day of payment (c).

In the absence of special agreement to the contrary, a domestic servant is entitled to be properly fed and lodged by his or her master or mistress ; and if prevented for a time, by sickness or other accident, from the performance of his or her duties, this does not justify the master or mistress in dismissing the servant without such notice or wages as might otherwise be claimed (d). By the Workmen's Compensation Act, 1906, a master is now liable to pay compensation in case of his domestic servant suffering an injury by accident arising out of and in the course of the employment (e).

The second species of servants are *labourers* employed in agriculture, and *workmen* engaged in trades, manufactures, and the like. These may be engaged for some specified period ; and, when so engaged, they cannot, in general, terminate their contracts by giving only a month's notice. The justices of the peace have,

- (a) *Todd v. Kellage* (1852) 5 H. & N. 635.  
 8 Exch. 151 ; *Brown v. Symons* (1860) 8 C. B. (N.S.) 208 ; *In re African Association and Allen* [1910] 1 K. B. 396.  
 (b) *Fairman v. Oakford* (1860) 5 H. & N. 635.  
 (c) *Spain v. Arnott* (1817) 2 Stark. 256.  
 (d) *Cuckson v. Stones* (1859) 1 Ell. & Ell. 248.  
 (e) See *post*, pp. 369–374.

in a variety of cases, jurisdiction to determine complaints between workmen and their employers, and to arrange by arbitration, under their direction, such differences as admit of that mode of settlement (*a*); and the justices, when sitting as a court of summary jurisdiction, have also now conferred upon them, by the Employers and Workmen Act, 1875, a concurrent *civil* jurisdiction with the County Courts, in disputes between parties standing in that relation to each other, where the sum claimed does not exceed 10*l.* (*b*). Under the Conciliation Act, 1896, which embodies previous legislation on the subject, Boards established for the purpose of settling disputes between employers and workmen by conciliation or arbitration, may be registered at the Board of Trade; and the Board of Trade may itself intervene in order to arrange, or to provide for the arrangement of, the dispute or difference. By the Trade Boards Act, 1909, Trade Boards, on which both employers and workmen are represented, have been established for fixing the rates of wages in certain trades; and an employer is punishable for employing any persons at wages lower than the rates so fixed. And by the Coal Mines (Minimum Wage) Act, 1912 (which is to remain in force for three years from the 29th March, 1912), provision is made for the fixing by similar Boards of minimum rates of wages for all workmen employed in a coal mine below ground; and it is an implied term of every contract for the employment of such a workman, that the employer shall pay to the workman wages at not less than the minimum rate settled under the Act and applicable

(*a*) See Truck Act, 1831; Master and Workman (Arbitration) Act, 1837; Hosiery Acts, 1843 and 1845; Silk Weavers Act, 1845; Agricultural Gangs Act, 1867.

(*b*) 38 & 39 Vict. c. 90, s. 4; *Hindley v. Haslam* (1878) 3 Q. B. D. 481; *Keates v. Lewis Merthyr Collieries* [1910] 2 K. B. 445.

to the workman, subject to certain exceptions in the case of workmen who are excluded under the district rules from the operation of this provision, or who have forfeited the right to wages at the minimum rate by reason of failure to comply with conditions as to efficiency or regularity (*a*).

The third species of servants are called *apprentices*; and these are infants, bound by indenture, usually for a term of years, to serve their masters, who on their part agree to maintain and instruct them in their trade during such period (*b*). The apprenticeship indenture must be executed by the infant; that being essential to the validity of the transaction in ordinary cases (*c*). But there are *parish* apprentices, to whom this rule does not apply. For the children of parents unable to maintain them may be apprenticed till the age of twenty-one to such persons as shall, by the Poor Law authorities, be thought fit to receive them, and this without their own consent or becoming parties to indentures; the apprenticing authority being the Guardians of the Poor Law Union of which the parish forms part (*d*). The persons selected as the masters of such apprentices were formerly compellable to take them (*e*); but, by the Poor Law Amendment Act, 1844 (*f*), the reception of a parish apprentice is no longer compulsory.

There are numerous statutes relative to parish apprentices (*g*); and there are also divers enactments

(*a*) *Jones v. Phœnix Colliery Co.* (1912) 28 T. L. R. 374; *Evans v. Gwendraeth Co.* [1913] 3 K. B. 100; *Lofthouse Colliery v. Ogden* [1913] 3 K. B. 100; *Davies v. Glamorgan Coal Co.* [1913] 3 K. B. 222.

(*b*) *Phillips v. Clift* (1859) 4 H. & N. 168; *Eaton v. Western* (1882) 9 Q. B. D. 636.

(*c*) *R. v. Arnesby* (1820) 3 B. & Ald. 584. (Cf. *Gadd v. Thompson* [1911] 1 K. B. 304.)

(*d*) Poor Law Amendment Act, 1844, s. 12.

(*e*) *Anon.* (1700) 1 Salk. 67; *Minchcamp's Case* (1702) 2 Salk. 491.

(*f*) S. 13.

(*g*) Poor Relief Act, 1601;

under which the justices of the peace may settle disputes between apprentices, whether bound by the parish or not, and their masters, or may discharge the apprentice from his indenture upon reasonable cause shown (*a*). Under the Employers and Workmen Act, 1875, any dispute between an apprentice, being an apprentice to whom the statute applies, and his master, may be heard and determined either by the justices (*b*), or by the County Court; in the same way as if the dispute was one between an employer and a workman. In such a case the justices may make an order directing the apprentice to perform his duties, and may enforce the order by imprisonment for a period not exceeding fourteen days (*c*); or they may, in a proper case, rescind the instrument of apprenticeship, and require the whole or any part of the apprenticeship premium to be refunded (*d*).

It is said that a master may administer physical chastisement to his apprentice, provided he do it with moderation, though he may not so correct his domestic or other servants (*e*); but at the present day a master could hardly be advised to avail himself of this right. An infant apprentice, like a menial servant, is (in the absence of special agreement) entitled to receive proper maintenance from his employer (*f*). He is also entitled to receive medicine and medical attendance (*g*);

8 & 9 Will. 3 (1696) c. 30; Parish Apprentices Acts, 1778, 1802, and 1816; Poor Law Amendment Act, 1844, ss. 12, 13; Poor Law (Apprentices) Act, 1851; and Divided Parishes Act, 1876, s. 27.

(*a*) Parish Apprentices Acts, 1792, 1816, and 1842; Parish Officers Act, 1793; Apprentices Act, 1814; Poor Law Amendment Act, 1834, ss. 15, 61.

(*b*) 38 & 39 Vict. c. 90, s. 5.

(*c*) *Ibid.* s. 6.

(*d*) *Ibid.* (But the Act only applies to apprentices whose premiums did not exceed £25 (s. 12)).

(*e*) *Gylbert v. Fletcher* (1630) Cro. Car. 179; *Winstone v. Linn* (1823) 1 B. & C. 469.

(*f*) *R. v. Gould* (1717) 1 Salk. 381.

(*g*) *R. v. Smith* (1837) 8 C. & P. 153.

though in the case of other servants it is not the master's duty to provide these (a).

Where the master or mistress is legally bound to provide necessary food, clothing, medical aid, or lodging, and he or she wilfully, and without lawful excuse, refuses or neglects so to do, so that the servant's health is, or is likely to be, permanently injured thereby, such master or mistress is guilty of a criminal offence under the Conspiracy and Protection of Property Act, 1875 (b).

A master was not, in general, liable at common law to his servant for an injury which was the result of the negligence of a fellow-servant, or of the defective condition of the factory, plant, or other property of the master in or about which the servant was employed ; unless it was shown that the master had failed in his duty of supplying proper appliances, and of superintending the work properly himself, or selecting proper persons to do so (c). When proper appliances had been supplied, and they afterwards became unsafe, and an injury thereby occurred to a servant, the latter could not recover damages from the master ; unless it was shown that the appliances had become unsafe to the knowledge of the master, and without the knowledge of the servant (d). This doctrine is known as the doctrine of 'common employment' ; and it is said that the principle is : *volenti non fit injuria*, and that a servant, when he engages to serve a master, undertakes to run all the ordinary risks of the service, including the risk of negligence on the part of a fellow-servant (e).

(a) *Wennall v. Adney* (1802) 3 Bos. & Pul. 247.

(b) 38 & 39 Vict. c. 86, s. 6.

(c) *Priestley v. Fowler* (1837) 3 M. & W. 1 ; *Weems v. Mathieson* (1861) 4 Macq. 227 ; *Gallagher v. Piper* (1864) 16 C. B. (N.S.) 669 ;

*Smith v. Baker* [1891] A. C. 325.

(d) *Griffiths v. London and St. Katharine Docks Co.* (1884) 13 Q. B. D. 259 ; *Williams v. Birmingham Battery & Metal Co.* [1899] 2 Q. B. 338.

(e) *Tunney v. Midland*

The rule has, however, been applied to infant workmen as well as to adults, and even to an infant who gave his services without remuneration (*a*). But, in a large number of cases, the common law rule has now been displaced by legislation; though apart from statute it is still in force.

For, by the Employers' Liability Act, 1880 (*b*), a workman or his legal personal representatives, or other persons entitled in case of his death, have, in a number of cases, the same right to compensation for injuries incurred in the service of the employer as they would have against a stranger; except that there is a limit to the amount recoverable (*c*). These cases include injuries caused:—(1) by defects in the employer's premises and machinery, where such defects are due to, or have not been discovered or remedied through, the negligence of the employer or any servant entrusted by him with the duty of seeing to their proper condition (*d*); (2) by the negligence of a fellow-servant having authority over the injured workman, or being in charge of any signal points, locomotive, or train on a railway (*e*). This Act applies only to workmen falling within the definition of 'workman' in the Employers and Workmen Act, 1875, and to railway servants. It does not, therefore, apply to menial servants (*f*);

*Rail. Co.* (1866) L. R. 1 C. P. 291; *Lovell v. Howell* (1876) 1 C. P. D. 161; *Membery v. Great Western Rail. Co.* (1889) L. R. 14 App. Ca. 179; *Coldrick v. Partridge* [1910] A. C. 77.

(*a*) *Cribb v. Kynoch* [1907] 2 K. B. 548; *Young v. Hoffmann Manufacturing Co.* [1907] 2 K. B. 646; *Bass v. Hendon U. D. C.* (1912) 28 T. L. R. 317.

(*b*) 43 & 44 Vict. c. 42.

(*c*) *Ibid.* s. 3.

(*d*) *Heske v. Samuelson* (1883) 12 Q. B. D. 30; *Cripps v. Judge* (1884) 13 Q. B. D. 583.

(*e*) *Cox v. Great Western Rail. Co.* (1882) 9 Q. B. D. 106; *Millward v. Midland Rail. Co.* (1884) 14 Q. B. D. 68; *McCord v. Cammell & Co.* [1896] A. C. 57.

(*f*) *Pearce v. Lansdowne* (1892) 62 L. J. Q. B. 441.

nor does it apply to a horse-omnibus conductor or driver of a horse-tramcar (*a*).

The Workmen's Compensation Act, 1906 (which repeals, and greatly extends the provisions of, the Workmen's Compensation Acts, 1897 and 1900), applies, however, to every workman as defined by the Act. And for the purposes of the Act the term 'workman' means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is express or implied, oral or in writing; with the following exceptions: (1) a person employed otherwise than by way of manual labour, whose remuneration exceeds 250*l.* a year; (2) a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business; (3) a member of a police force; (4) an outworker, *i.e.*, a person to whom articles or materials are given out to be made up, cleaned, or similarly dealt with, in his own home or on other premises not under the control of the person who gave out the materials or articles; and (5) a member of the employer's family dwelling in his house (*b*).

The Act is expressly made applicable to seamen, subject to special provisions (*c*), and to persons in the employment of the Crown, unless in the naval or military service (*d*); but, except in the case of seamen and apprentices, it has no application outside the United Kingdom (*e*).

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| <p>(<i>a</i>) <i>Morgan v. London General Omnibus Co.</i> (1884) 13 Q. B. D. 832; <i>Cook v. North Metropolitan Tramways Co.</i> (1887) 18 Q. B. D. 683. (The driver of a motor-bus may be within this Act (<i>Smith</i></p> | <p><i>v. Associated Omnibus Co.</i> [1907] 1 K. B. 916.)<br/>         (<i>b</i>) Act of 1906, s. 13.<br/>         (<i>c</i>) <i>Ibid.</i> s. 7.<br/>         (<i>d</i>) <i>Ibid.</i> s. 9.<br/>         (<i>e</i>) <i>Tomlin v. S. Pearson &amp; Son</i> [1909] 2 K. B. 61;</p> |
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The main provisions of this Act are as follows:—

(i.) Compensation is payable by the employer in all cases of injury by accident (*a*), whether resulting in death or not, arising out of and in the course of the employment (*b*); provided that—

(a) the employer is not liable under the Act in respect of any injury which does not disable the workman for a period of at least one week from earning full wages at the work at which he was employed (*c*);

(b) where, by reason of the personal negligence or wilful act of the employer, or some person for whose act or default the employer is responsible, the workman has a remedy independently of the Act, he may either claim compensation under the Act, or pursue such independent remedy. He cannot, however, obtain compensation under both heads (*d*), nor can he obtain both damages from a stranger who is legally liable, and also compensation from the employer, though he may take proceedings against both (*e*);

(c) if it is proved that the injury is attributable to the serious and wilful misconduct of the workman himself, no compensation is payable unless the injury results in death or serious and permanent disablement (*f*).

*Schwartz v. India-rubber, &c. Co.* [1912] 2 K. B. 299.

(a) Murder may be an 'accident' for this purpose (*Nisbet v. Rayne* [1910] 2 K. B. 689).

(b) Act of 1906, s. 11; *Powell v. Brown* [1899] 1 Q. B. 157; *Lowe v. Pearson* [1899] 1 Q. B. 261; *Smith v. Lancs. & Yorks. Ry. Co.*, *ibid.* 141; *Pomfret v. Lancs. & Yorks.*

*Ry. Co.* [1903] 2 K. B. 718; *Wicks v. Dowell* [1905] 2 K. B. 225; *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539; *Craske v. Wigan* [1909] 2 K. B. 635; *Brice v. Edward Lloyd, Ltd.* [1909] 2 K. B. 804.

(c) Act of 1906, s. 1 (2) (a).

(d) *Ibid.* s. 1 (2) (b).

(e) *Ibid.* s. 6; *Page v. Burtwell* [1908] 2 K. B. 758.

(f) Act of 1906, s. 1 (2) (c).

(ii.) If any question arises as to the existence of a liability under the Act, or the amount of the compensation payable, it must be determined by arbitration in accordance with the provisions contained in the second Schedule of the Act. If the parties are unable to agree upon an arbitrator, the matter is decided by the County Court Judge, sitting as arbitrator, or an arbitrator appointed by him. The Arbitration Act, 1889, does not apply to such arbitrations (a).

(iii.) The scale of compensation is as follows :—

(a) in case of death of the workman (b) leaving any members of his or her family wholly dependent on him or her, a sum equal to three years' wages, not being less than 150*l.* or more than 300*l.* Dependency is a question of fact in each case, and includes, not only an actual, but a reasonably anticipated prospect of, support by the deceased workman (c). The term 'member of a family' means wife or husband, parent, grandparent, and step-parent, child, grandchild, or stepchild, or brothers and sisters of the whole or the half-blood. Compensation is payable to parents and children, even where they are only related illegitimately to the deceased workman (d) ;

(b) in case of the death of the workman leaving such persons partly dependent on him, a reasonable

(a) Act of 1906, s. 1 (3) ; Sched. II. (1)–(4).

(b) 'Workman' includes persons of either sex (Act of 1906, s. 13, and Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 1 (1) (a)).

(c) *New Monckton Collieries Co. v. Keeling* [1911] A. C. 648 ; *Dobbie v. Egypt Co.* [1913] S. C. 364 (Scotch case).

(d) S. 13, Sched. I. (1) ; the dependant's right passes to his representatives (*United Collieries v. Simpson* [1909] A. C. 383) ; and a posthumous illegitimate child is entitled to compensation (*Orrell Collieries Co. v. Schofield* [1909] A. C. 433). But see *Ward v. H. S. Pitt & Co.* [1913] 2 K. B. 130.

- sum not exceeding the amount which would have been payable in the previous case ;
- (c) if he leaves no dependants, the reasonable expenses of his medical attendance and funeral, not exceeding 10*l.* ;
- (d) where the workman is totally or partially incapacitated, a weekly payment (which may, however, after six months be redeemed for a lump sum) not exceeding 50 per cent. of the workman's average wages for the previous twelve months, or such less period during which he has been in the same employment, and in no case exceeding 1*l.*, or, in the case of a workman under twenty-one years of age, not exceeding 100 per cent. of his average wages, and in no case more than 10*s.* If the incapacity lasts less than two weeks, no compensation is payable in respect of the first week (a).

(iv.) In order to entitle the injured workman or (in case of death) his dependants, to receive the compensation, notice of the accident must be given to his employer as soon as practicable, and before the workman has voluntarily left the employment in which he was injured ; and the compensation must be claimed within six months of the accident or (in case of death) within six months of the death. The notice is to contain the name and address of the person injured, and the cause and date of the injury ; but mistake, absence, or other reasonable cause may excuse a failure to comply with these requirements (b) ;

(v.) The Act applies in spite of an agreement between employer and workman to the contrary ; except where the Registrar of Friendly Societies has by his certificate sanctioned a scheme of compensation, as being not less favourable to the workmen of an employer and their

(a) Act of 1906, Sched. I.     (b) *Ibid.* s. 2.  
(1), (17).

dependants than the provisions of the Act, and as having been approved by a majority (to be ascertained by ballot) of the workmen to whom the scheme is applicable. The Registrar continues to have a superintendence over the working of any scheme so sanctioned by him; and may revoke his certificate upon due cause shown (*a*).

(vi.) In claims for compensation under the Act, as also in claims for damages independently of the Act, the fact that the principal employer has employed a contractor or sub-contractor to do the work, does not relieve the principal employer from liability. Such employer, however, has his remedy over against the intervening contractor; and the injured workman or his dependants have the option of proceeding either against the principal or the intervening contractor, but cannot obtain compensation from both. But in the case of a contract relating to threshing, ploughing, or other agricultural work, where the contractor provides machinery driven by mechanical power for the purpose of such work, he, and he alone, is liable to pay compensation in respect of any workman employed by him on such work (*b*).

(vii.) In case of the bankruptcy of the employer, or, if the employer is a company, the winding up of the company, the rights of the employer under any contract of insurance which he may have entered into against liability under the Act, vest in the workman; who, if the liability of the insurers to the workman is less than the employer's liability, may prove for the balance in the bankruptcy or winding up. The workman's claim to compensation (where there is no contract of insurance) is, to the extent of 100*l.* in any individual case, payable in priority to all other debts in the employer's bankruptcy or winding up (*c*).

(viii.) In addition to compensation for injury due to

(*a*) Act of 1906, s. 3.

(*c*) *Ibid.* s. 5.

(*b*) *Ibid.* s. 4.

accident, compensation upon the same terms, subject to slight modification, may also be claimed for disablement or death caused by certain 'industrial diseases' (such as anthrax, lead-poisoning, and ankylostomiasis or 'miner's worm') due to the nature of the employment (a).

If a workman be guilty of moral misconduct, or of wilful disobedience, or habitual neglect of his master's lawful commands, he may in any such case be dismissed without notice; and no wages can in such a case be claimed save for periods which have actually been completed before the dismissal (b).

A master who is willing to pay wages during the agreed period of service is not bound to find any work for the servant to do (c); and if he wrongfully dismisses his servant the damages cannot include compensation for the manner of dismissal, for the servant's injured feelings, or for the loss that he may sustain from the fact that the dismissal makes it more difficult for him to obtain fresh employment (d).

When a servant quits his place, the master is not under any legal obligation to give him or her a character (e); but if he gives a false character, imputing from malicious motives a fault which does not really exist, he is liable to an action at the suit of the party

- (a) Act of 1906, s. 8. In some cases injury due to disease, or the contracting of a disease is deemed to be in itself an 'accident' (*Clover, Clayton & Co. v. Hughes* [1910] A. C. 242; *Brintons v. Tarvey* [1905] A. C. 230. But see *Steel v. Cammell, Laird & Co.* [1905] 2 K. B. 232; *Eke v. Hart Dyke* [1910] 2 K. B. 677).
- (b) *Turner v. Robinson* (1833) 5 B. & Ad. 789; *Lomax v. Arding* (1854) 10 Ex. 734. (But see *Parkin v. South Hetton Coal Co.* [1908] W. N. 7 (a case of piece-work), and *George v. Davis* [1911] 2 K. B. 445.)
- (c) *Turner v. Sawdon* [1901] 2 K. B. 653.
- (d) *Addis v. Gramophone Co.* [1909] A. C. 488.
- (e) *Carrol v. Bird* (1820) 3 Esp. 201.

thus injured (a). No action will, however, lie upon a representation contained in a character or made in answer to the inquiries of an intending master, though false in fact, and injurious to the character of the servant (b), if it was made *bonâ fide*. Such a representation is held to be a privileged communication; but the privilege is a qualified one, and will therefore be lost if actual malice is shown to exist.

A servant, duly discharging the duties of his service, is entitled to recover his wages, up to 50*l.*, in preference or priority to the general creditors, in case of the death insolvent or of the bankruptcy of his master, or, where the employer is a company, in case of its winding up (c).

Under the Truck Acts, 1831 to 1896 (d), a workman's wages, except in the case of a servant in husbandry, must be paid to him in cash, and not in goods; and the master's power of making deductions in respect of fines or otherwise is limited. The Shop Clubs Act, 1902 (e), proceeds on a similar principle, in making it an offence for an employer to impose it as a condition of employment, that a workman should become a member of a shop-club or thrift fund; unless such club or fund is certified in accordance with the Act by the Registrar of Friendly Societies, and duly registered under the Friendly Societies Act, 1896.

Under the National Insurance Acts, 1911 and 1913,

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| (a) <i>Fountain v. Boodle</i>        | s. 209. (See <i>ante</i> , p. 288.)           |
| (1842) 3 Q. B. 5.                    | (d) 1 & 2 Will. 4 (1831)                      |
| (b) <i>Child v. Affleck</i> (1829) 9 | c. 37; 50 & 51 Vict. (1887)                   |
| B. & C. 403; <i>Somerville v.</i>    | c. 46; 59 & 60 Vict. (1896)                   |
| <i>Hawkins</i> (1850) 10 C. B. 583;  | c. 44; <i>Squire v. Bayer &amp; Co.</i>       |
| <i>Taylor v. Hawkins</i> (1851) 16   | [1901] 2 K. B. 299; <i>Williams</i>           |
| Q. B. 303.                           | <i>v. North's Navigation Collieries</i>       |
| (c) Preferential Payments            | [1906] A. C. 136.                             |
| in Bankruptcy Act, 1888 (51          | (e) 2 Edw. 7, c. 21. (See                     |
| & 52 Vict. c. 62); Companies         | <i>Balchin v. Ebury</i> ( <i>Times</i> , Mar. |
| (Consolidation) Act, 1908,           | 12, 1903.)                                    |

it is the duty of an employer to pay the contributions in respect of health insurance, and (in the case of insured trades) unemployment insurance, which are payable by himself and by the employee; and he is entitled to recover from the latter, by deduction from his wages or otherwise, the amount payable by the employee. In certain cases he is liable to pay a contribution, even though the employee is not insured, and no contribution is payable by the latter (*a*). An employer who fails to fulfil his liabilities under the Act is liable to conviction, accompanied by fine, on summary prosecution (*b*); and he is also liable to civil proceedings by any workman who, being a member of an 'approved society,' has been deprived of any benefit by failure of his employer to pay contributions properly payable by such employer (*c*).

[A master may *maintain*, that is, abet and assist, his servant in bringing and prosecuting an action against a stranger; that is to say, he does not commit the offence of 'maintenance,' if he do so (*d*). A master may also bring an action against any man for beating or maiming his servant; but in such a case, he must assign, as a special reason for so doing, his own damage by the loss of services. And this loss must (under the name of special damage) be proved at the trial (*e*). But it has been held that no such action lies where the servant is killed (*f*); for, except under the express provisions of some statute, no civil action lies for the

(*a*) National Insurance Act, 1911, ss. 3, 85.

(*b*) *Ibid.* s. 69.

(*c*) *Ibid.* s. 70.

(*d*) 2 Roll. Ab. 115. As to 'maintenance,' see *post*, bk. v. ch. i. vol. iii. pp. 345-346, and bk. vi. ch. viii. vol. iv. pp. 210-211.

(*e*) *Marys' Case* (1612) 9

Co. Rep. 113; *Hall v. Hollander* (1825) 4 B. & C. 660; *Hodsoll v. Stallibrass* (1840) 11 A. & E. 301.

(*f*) *Osborn v. Gillett* (1873) L. R. 8 Ex. 88; *Clark v. London General Omnibus Co.* [1906] 2 K. B. 648. (But see *Jackson v. Watson* [1909] 2 K. B. 193.)

[death of a human being. A master may also justify an assault in the defence of his servant, and a servant in the defence of his master (*a*); the master, because he has an interest in his servant, not to be deprived of his services, the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master. Also, if any person do cause or procure my servant to leave me, or do hire or retain my servant, being in my service, whereby the servant departs from me and goes to serve another, I may have an action for damages against both the new master and the servant, or either of them; but if the new master did not know that he was my servant, no action lies against him, unless indeed he afterwards refuses to restore the servant upon information and demand (*b*).] The right of the employer to damages against any person who wilfully induces the employed to break his contract of employment, exists even in cases where the relation is not strictly that of master and servant (*c*). But it is not actionable to induce or assist a workman to remain away from his former employer's service, after the contract of employment has come to an end; even though in the first instance the workman left the service in breach of his contract (*d*).

The master's right to maintain an action for loss of service has been put to the use of enabling a father to maintain an action for the seduction of a daughter, who has thereby become pregnant. The father has the right to the services of his daughter living with him; and the mere right to the services is sufficient to maintain an action of this kind, proof of actual service

(*a*) 2 Roll. Ab. 546; 1 715; *Quinn v. Leatham* [1901] Hawk. bk. i. ch. 60, ss. 23, 24. A. C. 495.

(*b*) F. N. B. 167, 168; (*c*) *Bowen v. Hall*, *ubi sup.*  
*Blake v. Lanyon* (1795) 6 (*d*) *Denaby and Cadeby*  
 T. R. 221; *Bowen v. Hall* *Main Collieries v. Yorkshire*  
 (1881) 6 Q. B. D. 333; *Tem-* *Miners' Association* [1906] A.  
*perton v. Russell* [1893] 1 Q. B. C. 384.



being unnecessary (*a*). But the action will not lie at the suit of the father, when at the time of the seduction the daughter is actually in the service of some other person (*b*). Where the action by the father lies, the damages are not limited to the value of the services, which may be merely nominal; but substantial damages may be given for the father's injured feelings (*c*).

The master's right of action for loss of service has in recent times also been used to enable employers to recover damages from trade unions or their officers, in cases where workmen have been induced to go on strike in breach of contract; and in some cases damages and injunctions have been obtained, even independently of breach of contract (*d*). But by the Trade Disputes Act, 1906 (*e*), it is provided that an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills.

[As a general rule, a master is answerable to strangers for an injury done or occasioned to them by the act or negligence of his servant, if done either by his express command or authority, or within the course of the servant's employment; the maxim being, *qui facit per alium, facit per se* (*f*). In this respect, the law makes

(*a*) *Terry v. Hutchinson*  
(1868) L. R. 3 Q. B. 599.

(*b*) *Hedges v. Tagg* (1872)  
L. R. 7 Ex. 283.

(*c*) *Terry v. Hutchinson*,  
*ubi sup.*

(*d*) *Taff Vale Railway Co.*  
*v. Amalgamated Society of*  
*Railway Servants* [1901] A. C.  
426; *Quinn v. Leatham*, *ibid.*

p. 495; *Glamorgan Coal Co.*  
*v. South Wales Miners' Federa-*  
*tion* [1905] A. C. 239.

(*e*) 6 Edw. 7, c. 47, s. 3.

(*f*) *Quarman v. Burnett*  
(1840) 6 M. & W. 509; *Cox*  
*v. Midland Rail. Co.* (1849)  
3 Exch. 268; *Jones v. Scul-*  
*lard* [1898] 2 Q. B. 565.

[no distinction between ordinary servants and those who are more properly and usually termed *agents*; excepting that, where the agents are independent contractors, the liability of these latter usually (*a*), but not invariably, operates to exempt the principal.] For the rule is, that a person causing a thing to be done, the doing of which casts on him a duty to take precautions (as for instance, where the doing of the thing involves danger to his neighbour or to the public), cannot escape from the responsibility of seeing the duty performed by delegating it to a contractor (*b*). And of course he is liable if the thing contracted to be done is itself unlawful. [Accordingly, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused; for he is only to obey his master in matters that are honest and lawful. On the same principle, if a servant, by his negligence, do any damage to a stranger, the master shall answer for the neglect, *e.g.*, if a smith's servant lame a horse while he is shoeing him, an action lies against the master (*c*). But in all these cases, the wrongful act or default must be done within the scope of the servant's employment; for otherwise the master is not liable (*c*).]

A master will be liable for the acts of his servant done in the erroneous or wrongful execution of a lawful authority; as, for instance, when the servant on his master's behalf arrests a supposed offender (*d*).

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| ( <i>a</i> ) <i>Overton v. Freeman</i>      | P. 105.                                     |
| (1852) 11 C. B. 867.                        | ( <i>c</i> ) <i>Storey v. Ashton</i> (1869) |
| ( <i>b</i> ) <i>Bower v. Peate</i> (1876) 1 | L. R. 4 Q. B. 476; <i>Venables</i>          |
| Q. B. D. 321; <i>Dalton v.</i>              | <i>v. Smith</i> (1877) 2 Q. B. D.           |
| <i>Angus</i> (1881) L. R. 6 App. Ca.        | 279; <i>Stevens v. Woodward</i>             |
| 740; <i>Hardaker v. Idle D. C.</i>          | (1881) 6 Q. B. D. 319.                      |
| [1896] 1 Q. B. 335; <i>Penny v.</i>         | ( <i>d</i> ) <i>Moore v. Metropolitan</i>   |
| <i>Wimbledon D. C.</i> [1899] 2             | <i>Rail. Co.</i> (1872) L. R. 8 Q. B.       |
| Q. B. 72; <i>The Snark</i> [1900]           | 36.   |

And this is so, even where the master has forbidden the servant to do the particular act ; provided the act was done in the course of his employment, and in the supposed interest of the master (a). And even where a fraud is committed by the servant for his own purposes, and not for the benefit of his master, but in the course, and within the scope, of the duties with which he has been entrusted, the master will be liable (b). But for the criminal or wrongful acts or negligence of a servant, not authorised by the master, nor committed within the scope of the servant's employment, the master is not liable (c).

With regard to contracts and representations inducing a contract, a similar principle applies ; the master is bound not merely by the acts of his servant which he has authorised, but by those within the scope of his apparent authority. But he is not bound by those which were not authorised by him, nor within the scope of the authority which the servant appears to have. [Thus, if I pay money to a gentleman's servant not usually employed to receive money for his master, and such servant embezzles it, I must pay the money over again to the servant's master. And if I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust, if he purloin it, so that it comes not to my use ; for here is no implied order to the tradesman to trust my servant. But if I usually send my servant upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all the servant takes up ; for the

(a) *Limpus v. London General Omnibus Co.* (1862) 1 H. & C. 526.

(b) *Lloyd v. Grace, Smith & Co.* [1912] A. C. 716.

(c) *Hanson v. Waller* [1901]

1 K. B. 390 ; *Sanderson v. Collins* [1904] 1 K. B. 628 ; *Cheshire v. Bailey* [1905] 1 K. B. 237 ; *Glasgow Corporation v. Lorimer* [1911] A. C. 209.

tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority (*a*).] So it has been held, that the servant of a horse dealer employed to sell a horse can bind his master by a warranty as to the soundness of the horse (*b*); but the servant of a private owner, employed on a single occasion for the like purpose, cannot do so (*c*).

A servant is not, in general, himself personally liable in respect of contracts entered into by him in the capacity of servant, *e.g.*, with respect to his purchases from tradesmen for his master's use, if he be known by the person with whom he deals to be acting merely as a servant; and, if his authority to purchase be sufficient, he cannot himself be charged for the price of the goods. And a servant cannot, for an act of negligence in the execution of a contract, be sued by one who was dealing at the time with the master; so that, if a parcel be mislaid by a stage coachman, the owner of the coach with whom the contract of carriage was made is liable to the sender, but not the coachman himself (*d*). But if the servant commit a crime, he will, of course, himself be criminally liable. And if he commits a tort, however innocently, in the course of his employment, he may be sued for damages; either separately from the master, or, where the master also is liable, jointly with him (*e*).

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| ( <i>a</i> ) <i>Doctor and Student</i> , d. 2, ch. 42; <i>Noy, Max.</i> ch. 44; <i>Rusby v. Scarlett</i> (1803) 5 Esp. 76; <i>Wright v. Glyn</i> [1902] 1 K. B. 745. | 9 C. B. (N.S.) 592.  |
| ( <i>b</i> ) <i>Howard v. Sheward</i> (1866) L. R. 2 C. P. 148.  | ( <i>d</i> ) <i>Williams v. Cranston</i> (1817) 2 Stark. 82.   |
| ( <i>c</i> ) <i>Brady v. Todd</i> (1861)   | ( <i>e</i> ) <i>Stephens v. Elwall</i> (1815) 4 M. & S. 259. <i>Cf. Hollins v. Fowler</i> (1875) L. R. 7 H. L. 757; <i>Barker v. Furlong</i> [1891] 2 Ch. 172. |

## CHAPTER II.

## OF HUSBAND AND WIFE.

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WITH regard to the relation of husband and wife, it is proper to premise, that as, in the Roman Catholic faith, marriage ranks as a sacrament of the Church, so it naturally fell, during the period before the Reformation, under the cognisance of the ecclesiastical courts. These courts accordingly acquired jurisdiction in various matters of a matrimonial description ; including judicial separation, divorce, alimony, suits for the restitution of conjugal rights, suits *causâ jactitationis matrimonii*, and suits to compel the celebration of marriages pursuant to contracts of marriage. Notwithstanding the reformation in religion, the ecclesiastical jurisdiction in these respects remained undisturbed ; until, by the Matrimonial Causes Act, 1857, a secular court was constituted, under the title of the Court of Divorce and Matrimonial Causes, with jurisdiction over such matters matrimonial as were formerly within the cognisance of the courts ecclesiastical, and with a more extensive jurisdiction. By the Legitimacy Declaration Act, 1858 (a), jurisdiction was also given to the new court to entertain applications for declarations of legitimacy, and for declaration of the validity of the marriages of the applicant's parents or grand-parents, and of the applicant's right to be deemed a natural-born subject. The jurisdiction of the Court so established has now, by the Judicature

(a) 21 & 22 Vict. c. 93 ; 3 P. & D. 196, 270 ; *Bosville Frederick v. A.-G.* (1874) L. R. v. *A.-G.* (1887) 12 P. D. 177.

Act, 1873 (a), been transferred to the Probate, Divorce, and Admiralty Division of the High Court of Justice ; but with a procedure comparatively unaltered.

In considering the relation of husband and wife, we shall, in the first place, inquire how that relation is contracted ; second, its legal effect ; and third, the mode of its dissolution.

I. *The manner in which the relation of husband and wife is contracted.*—Marriage, although it is much more than a contract, resembles a contract in so far that the full and free consent of the parties is necessary to its validity. Accordingly, decrees of nullity of marriage have been made in cases where a woman went through the form of marriage under duress, or under such parental influence as to prevent her from being a free agent, and in the belief that the ceremony was merely one of betrothal (b). But a fraud, however gross, has no effect upon the validity of a marriage, if it is not such as to exclude an actual consent to the marriage. Thus, where a woman fraudulently concealed from her future husband her pregnancy by another man, the Court refused to dissolve the marriage (c).

Moreover, the rules relating to the capacity of persons to marry differ widely from those relating to the capacity to enter into contracts in general. And there is a curious distinction, surviving from the days when matrimonial causes were under the jurisdiction of the ecclesiastical courts, with regard to them. For the disabilities which prevent the formation of a valid marriage are divided into two classes—canonical and civil. No canonical disability will avoid a marriage,

(a) 36 & 37 Vict. c. 66, [1896] P. 1.  
 ss. 3, 34. (c) *Moss v. Moss* [1897]  
 (b) *Scott v. Sebright* (1886) P. 263.  
 12 P. D. 21 ; *Ford v. Stier*

unless and until an actual sentence to that effect has been given while both parties were living; and a marriage entered into under a canonical disability is voidable only, and not void, until such sentence (*a*). On the other hand, the effect of a civil disability, is (except in the case of want of age) to render the marriage void *ab initio* (*b*); and the civil courts will recognise and give effect to such disability in any case where the validity of the marriage is material to the issue, (as upon a claim for dower or inheritance,) without the sentence of a court of matrimonial jurisdiction having been pronounced.

Canonical disabilities were formerly numerous; but one only, namely physical inability to procreate children, now remains (*c*). A pre-contract (*i.e.*, a previous contract to marry a third person), which was formerly a canonical disability, inasmuch as the ecclesiastical courts could order such contract to be performed by the celebration of the marriage, has ceased to be any disability at all since Lord Hardwicke's Marriage Act of 1753 (*d*); by which it was provided, that no proceedings should be had in any ecclesiastical court to compel the celebration of a

(*a*) Co. Litt. 33 a; *Bury's Case* (1598) 5 Rep. 98; 1 Roll. Ab. 360.

(*b*) But *quære* whether the invalidity of the marriage of a lunatic not so found can be asserted otherwise than by obtaining a decree of nullity in the matrimonial jurisdiction.

(*c*) The Courts sometimes inferred such inability, without other evidence, from a persistent refusal *ab initio* to consummate the marriage (*B. v. B.* [1901] P. 39; *W. v. S.* [1905] P. 231). But in a

recent case the Court, while refusing to rely on this inference or fiction, has treated such refusal as being in itself a ground for annulling the marriage (*Dickinson v. Dickinson* [1913] P. 199).

(*d*) 26 Geo. 2, c. 33, s. 13, repealed and re-enacted on this point by the Marriage Act, 1823 (4 Geo. 4, c. 76, s. 27). The disability of pre-contract was removed in certain cases by 32 Hen. 8 (1540) c. 38; but that statute was in this respect repealed by 2 & 3 Edw. 6 (1548) c. 23.

marriage by reason of any contract. And the disabilities resulting from consanguinity and affinity, which were formerly canonical, were made civil disabilities by the Marriage Act, 1835 (*a*). A person domiciled abroad, who voluntarily and in due form according to the laws of England enters into a marriage in England with a person there domiciled, cannot dispute the validity of the marriage on the ground of an alleged incapacity imposed by the law of his foreign domicile (*b*).

Disabilities of the civil kind are commonly grouped under these classes, namely :—(i.) a prior marriage still subsisting ; (ii.) insanity ; (iii.) relationship by blood or marriage ; and (iv.) want of age. Each of these four disabilities will now be considered.

(i.) The first of them, namely, a prior marriage still subsisting, wants no particular observation ; excepting this, that the second marriage is to all intents and purposes void (*c*). And this is so, whether or not the parties contracting the second marriage knew of the existence of the former.

(ii.) The marriage of a lunatic, unless where contracted in a lucid interval, is void (*d*) ; provided that the insanity is such as to prevent a real appreciation of the engagement apparently entered into (*e*). The invalidity of the marriage may be asserted, and a decree of nullity obtained, as well by the sane as by the insane party to the marriage (*f*). In order to avoid the difficulty of proving the exact state of the party's mind at the time of the marriage, it has been

(*a*) 5 & 6 Will. 4, c. 54.

E. 540.

(*b*) *Chetti v. Chetti* [1909] P. 67.

(*d*) *Hancock v. Peaty* (1867) L. R. 1 P. & D. 335.

(*c*) Bro. Ab. tit. *Bastardy*, pl. 8 ; *Riddleston v. Wogan* (1602) Cro. Eliz. 858 ; *Pride v. Bath* (1695) 1 Salk. 120 ; *R. v. Harborne* (1835) 2 A. &

(*e*) *Durham v. Durham* (1885) 10 P. D. 80.

(*f*) *Hunter v. Edney* (1881) 10 P. D. 93.



specifically provided by the Marriage Act, 1811 (*a*), that the marriage of a person already found lunatic shall be totally void ; unless he or she has been previously declared to have, at the date of the celebration, regained a sound mind.

(iii.) The third and most frequent civil incapacity is undue proximity of relationship ; whether of consanguinity or of affinity.

This disability received statutory recognition by a statute of 1540 (*b*), which enacted that “ no reservation “ or prohibition, God’s law except, shall trouble “ or impeach any marriage without the Levitical “ degrees ” (*c*).

The following marriages are deemed to be within the Levitical degrees, and are accordingly prohibited, (1) marriages contracted between persons lineally related *in infinitum* (*d*) ; (2) marriages contracted between collaterals, whether of the whole blood or of the half-blood (*e*) to the third degree inclusive, according to the mode of computation in the civil law (*f*) ; (3) marriages contracted between persons related by affinity within the corresponding degrees lineal or collateral (*g*). The blood relations of a man’s wife are always related to him by affinity ; and the

(*a*) 51 Geo. 3, c. 37.

(*b*) 32 Hen. 8, c. 38. (See also earlier statutes (since repealed) giving a list of prohibited degrees ; *e.g.*, 25 Hen. 8 (1534) c. 22, and 28 Hen. 8 (1536) c. 7 ; *Sherwood v. Ray* (1831) 1 Moo. P. C. 353 ; and the 99th canon of 1603.)

(*c*) Levit. xviii., xx. ; *Brook v. Brook* (1861) 9 H. L. C. 232.

(*d*) *Gibbs. Cod.* 413 ; *Burn, tit. Marriage*, I. ; *Extrav. de Consanguin.* &c. Can. 8 ; *Grot. De Jure Belli et Pacis*, l. 2,

cap. 5, s. 12. But it is obvious that cases of marriages between remote lineal relations cannot arise.

(*e*) *Bac. Abr. Marriage*, A.

(*f*) *Harrison v. Barwell* (1669) *Vaughan*, 218 ; *R. v. Chadwick* (1847) 11 Q. B. 173 ; *De Wilton v. Montefiore* [1900] 2 Ch. 481. (As to the mode of computation by the civil law, see *ante*, p. 321.)

(*g*) *Hill v. Good* (1674) *Vaughan*, 302 ; *Brook v. Brook* (1861) 9 H. L. C. 193.

blood relations of a man are similarly related to his wife. Thus, a man may not marry his own sister nor, until recently, could he marry his deceased wife's sister; for both are related to him in the second degree. Nor can he marry his own sister's daughter, nor his deceased wife's sister's daughter (*a*); for both are in the third degree. But he may marry his first cousin; for she is in the fourth degree. On the other hand, the blood relations of the husband are not related by affinity to the blood relations of the wife; hence, two brothers may marry two sisters, or father and son a mother and daughter. And the husband is not related to the *affines* of his wife; so that a man may marry the widow of his deceased wife's brother.

As already stated, the incapacity in respect of proximity of relationship was formerly but a canonical disability (*b*); but, by the Marriage Act, 1835, it was made a civil disability, that statute having enacted (*c*), that all marriages thereafter celebrated between persons within the prohibited degrees should be absolutely void. This statute has, however, no operation on marriages celebrated abroad between persons domiciled abroad, who are by the law of their domicile permitted to marry; as between a woman and the brother of her deceased husband. Such a marriage, celebrated in Italy, where it is permitted, has been held valid in this country (*d*). And, by the Deceased Wife's Sister's Marriage Act,

(*a*) *The Queen v. Inhabitants of Brighton* (1861) 1 B. & S. 447; *De Wilton v. Montefiore, ubi sup.*

(*b*) *Watkinson v. Mergatson* (1683) Sir T. Raym. 464; *R. v. Inhabitants of Wye* (1838) 7 A. & E. 771.

(*c*) S. 2.

(*d*) *Husey-Hunt v. Bozzelli* [1902] 1 Ch. 751. It is otherwise where persons domiciled in this country go abroad temporarily for the purpose of contracting a marriage prohibited by the English law (*Mette v. Mette* (1859) 1 Sw. & Tr. 416).

1907 (*a*), it is now provided, that no past or future marriage contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been, or shall be, void or voidable as a civil contract, by reason only of such affinity. The Act contains certain provisoes—(1) protecting existing rights and interests duly acquired (including marriages entered into under the previous law), and (2) relieving clergymen from the duty of celebrating such marriages, to which many of them have a conscientious objection (*b*). Marriage with other persons related by affinity (*e.g.*, with a deceased wife's niece) still remains prohibited; as also marriage, between a man and the sister of his divorced wife, during the lifetime of the latter.

(iv.) [The fourth civil disability is want of age; a disability which, as it avoids other contracts, so it avoids this contract also. But it is not necessary to the contract of marriage that the parties should have attained their full age of twenty-one; for a male person is enabled by law to consent to matrimony at the age of fourteen, and a female at the age of twelve (*c*). But, even though the male be under fourteen, or the girl under twelve, the marriage is regarded as being inchoate only and imperfect (*d*), not

(*a*) 7 Edw. 7, c. 47. A past marriage is validated, even if one of the parties died before the passing of the Act (*In re Green* [1911] 2 Ch. 275). But such validation is not retrospective, so as to affect proprietary rights (*In re Whitfield* [1911] 1 Ch. 310). (The Colonial Marriage Act of 1906 (6 Edw. 7, c. 30) had already recognised the validity of a marriage between a man and his deceased wife's sister, contracted in a part of the British Empire where such marriages

are legal.)

(*b*) Since the passing of the Act, marriage with a deceased wife's sister has not been a lawful cause within 1 Edw. 6, c. 1, s. 8, for repelling the parties to the marriage from Holy Communion (*Banister v. Thompson* [1908] P. 362; *Thompson v. Dibdin* [1912] A. C. 533).

(*c*) Co. Litt. 79 a; 1 Hale, P. C. 17.

(*d*) Co. Litt. by Harg. 79 b, n. (1).

[void ; so that either of the parties, upon coming to the proper age for his or her consent, may disagree and declare the marriage void (*a*), or else may affirm it.] A marriage between persons, either of whom is under the age of seven years, was by the canon law treated as absolutely void (*b*), and would probably be so regarded at the present day ; though Littleton tells us, that if the wife be past the age of nine years at the time of the death of her husband, she shall be endowed, albeit he were but four years old (*c*).

But it should be noted, that what is above stated is to be understood of the actual marriage, by which the parties become man and wife ; for a promise to marry at a future time, which, like other contracts, gives a right of action for damages in case of its violation (*d*), is not binding on the defendant unless he or she be at the time of the full age of twenty-one years. And so persons are able to marry who could not enter into a binding contract to marry. But, where there are mutual promises to marry made by two persons, one of the age of twenty-one, and the other under that age, the former may be sued for a breach of his promise, although the latter cannot be sued (*e*).

We have next to consider the forms necessary to the validity of a marriage. The canon law recognised the validity for many purposes of a marriage by mere consent ; whether *per verba de præsenti* or *per verba de futuro, subsequente copulâ*. But the temporal courts refused to give full effect to a marriage not solemnised

(*a*) Co. Litt. by Harg. 79 a, 79 b ; Bac. Ab. *Infancy*, A.

(*b*) Burn, *Ecc. Law*, tit. *Marriage*, i. ; Pollock & Maitland, *History*, ii. 388 ; Co. Litt. 33 a.

(*c*) S. 36 (Co. Litt. 33 a).

(*d*) *Wild v. Harris* (1849) 7 C. B. 999.

(*e*) *Hood v. Ward* (1732) Str. 937 ; *Warwick v. Bruce* (1813) 2 M. & S. 205 ; *Infants Relief Act*, 1874 (37 & 38 Vict. c. 62) ; *Coxhead v. Mullis* (1878) 3 C. P. D. 439 ; *Northcote v. Doughty* (1879) 4 C. P. D. 385 ; *Ditcham v. Worrall* (1880) 5 C. P. D. 410.

in church ; or at any rate in the presence of a priest (*a*). The rule that at common law the presence of a priest in holy orders is essential for all purposes to the validity of a marriage was finally established in 1843 (*b*). If this requirement is complied with, a marriage is, as regards form, validly celebrated in cases where no further formalities are prescribed by statute ; as in the case of a marriage on board a British man-of-war (*c*). But in the majority of cases the formalities necessary to a valid marriage are now regulated by the Marriage Acts, 1811 to 1898 ; of which the most important are those of 1823 and 1836 (*d*).

By the Marriage Act, 1823, the first formality required is, the previous publication of *banns* upon three successive Sundays in the church or churches of the parish or parishes wherein the parties do dwell (*e*) ; or, in lieu thereof, a *licence* from the proper ecclesiastical authority, that the marriage shall be had without banns (*f*), which may be either a ‘special’ licence from the Archbishop of Canterbury (*g*), or a ‘common’

(*a*) Pollock & Maitland, *History*, ii. 373 ; *Haydon v. Gould* (1710) 1 Salk. 119.

(*b*) *R. v. Millis* (1843) 10 Cl. & F. 534. The Lords were equally divided ; and the force of the decision rests only on the principle of *præsumitur pro neganti*. The decision was followed in *Catherwood v. Caslon* (1844) 13 M. & W. 261. It has been decided that a clergyman cannot validly celebrate his own marriage, no other clergyman being present (*Beamish v. Beamish* (1861) 9 H. L. C. 273). *Semble*, Roman Catholic Orders are sufficient for the purposes of the common law ; even though the marriage formalities do

not comply with the requirements of the Roman Catholic Church (*R. v. Fielding* (1706) 14 St. Tr. 1327 ; *Ussher v. Ussher* [1912] 2 I. R. 445).

(*c*) *Culling v. Culling* [1896] P. 116.

(*d*) 4 Geo. 4, c. 76 ; 6 & 7 Will. 4, c. 85.

(*e*) Marriage Acts, 1823, s. 2 ; 1837, s. 34 ; Lyndw. 273, 274. (As to the publication of banns on board His Majesty’s ships, see *Naval Marriages Act*, 1908, *post*, p. 404.)

(*f*) Marriage Act, 1823, s. 10 ; Can. 101 of 1603 ; Marriage Act, 1857, s. 6.

(*g*) 25 Hen. 8 (1534) c. 21 ; Act of 1823, ss. 10, 20 ; Act of 1836, s. 1.

licence from the Ordinary or his surrogate (*a*). The banns must be published, and the licence granted, in the true names of the marrying parties (*b*); and the marriage must be solemnised within, at the latest, three months after the complete publication of the banns, or grant of the licence (*c*). The Act also requires that, except when the marriage is by special licence, it shall be celebrated in a church or chapel wherein banns may be lawfully published (*d*), and shall take place between the hours of eight and twelve in the forenoon; but by the Marriage Act, 1886 (*e*), the time has now been extended to three in the afternoon. The presence of two witnesses is required, in addition to that of the minister who celebrates the marriage (*f*).

In order to prevent the marriage of persons under the age of twenty-one without the consent of their parents or guardians, the statute of 1823 also provides, that in the case of the publication of banns of a person under twenty-one, not being a widower or a widow, if the parent or guardian of the infant openly signifies his dissent at the time the banns are published, the publication shall be void (*g*). And, in furtherance of the same object, no licence to marry, neither a common licence nor a special licence, may be granted; unless oath shall be first made by one of the parties that he or she believes that there is no impediment of kindred or alliance, or other lawful impediment, to the pro-

(*a*) 10 & 11 Vict. (1847) c. 98, s. 5.

(*b*) *R. v. Wroxton* (1833) 4 B. & Ad. 641; *Gomperiz v. Kensit* (1872) L. R. 13 Eq. 369; *Fendall v. Goldsmid* (1877) 2 P. D. 263.

(*c*) Act of 1823, ss. 9, 19.

(*d*) *Ibid.* ss. 3, 4, 12, 13. (And see 58 Geo. 3 (1818) c. 45; 59 Geo. 3 (1819) c. 134; 5 Geo. 4 (1824) c. 32; 6 Geo. 4

(1825) c. 92; 11 Geo. 4 & 1 Will. 4 (1830) c. 18; 6 & 7 Will. 4 (1836) c. 85, ss. 26–34; 7 Will. 4 & 1 Vict. (1837) c. 22; 1 & 2 Vict. (1838) c. 107, ss. 16, 33, 34; 7 & 8 Vict. (1844) c. 56; 20 Vict. (1857) c. 19, s. 9; 23 Vict. (1860) c. 24.)

(*e*) 49 & 50 Vict. c. 14.

(*f*) Act of 1823, s. 28.

(*g*) *Ibid.* ss. 8, 16.

posed union, and that one of the parties hath, for the space of fifteen days immediately preceding the issue of the licence, had his or her usual place of abode within the parish or chapelry within which the marriage is to be solemnised, and, where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons whose consent is required has been obtained, or else, that there is no person who has authority to give such consent (*a*). The consent required is that of the father; or if the father be dead, then that of the lawfully appointed guardian (*b*); and, failing him, then of the mother being unmarried; and, failing her, then of a guardian appointed by the High Court of Justice (*c*). In case the person whose consent is required is *non compos mentis*, or unreasonably withholds his or her consent, relief against the difficulty so occasioned is obtainable on petition to the Lord Chancellor (*d*).

Any person celebrating a marriage otherwise than in accordance with the provisions of the statute renders himself liable to severe penalties (*e*); and, according to the statute, in the following cases the marriage is *null and void*, viz.:—(1) if the parties knowingly and wilfully intermarry, unless by special licence, in a place other than a church or chapel wherein banns may be lawfully published; (2) if they knowingly and wilfully intermarry without either due publication of banns, or else a licence; or (3) if they knowingly and wilfully consent to or acquiesce in the solemnisation of their marriage according to the office of the Church, by a person not being in holy orders (*f*). But where a marriage by licence or with banns has been solemnised

(*a*) Act of 1823, s. 14.

(*b*) *Ibid.* s. 16.

(*c*) *Ibid.*; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34.

(*d*) Act of 1823, s. 17; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 94.

(*e*) Act of 1823, s. 21.

(*f*) *Ibid.* s. 22.

between persons, either of whom is under age, by means of the false oath or fraudulent procurement of one of the parties, then the Act merely provides, that the party offending shall be liable to forfeit all property which would otherwise accrue to him or to her from the marriage (*a*); and, subject thereto, the marriage remains valid.

Whether a marriage celebrated by a person whom both parties erroneously suppose to be in holy orders would be valid, is a doubtful question. The better opinion is that it would be valid (*b*). But the Marriages Validation Act, 1888 (*c*), was passed *ex majore cautela*; in order to remove doubts as to the validity of certain marriages which had been solemnised by a notorious felon (W. E.), who had falsely pretended to be a priest.

Numerous Acts have been passed from time to time for the purpose of curing irregularities in marriages, which but for such irregularities would have been valid (*d*). Recently, in order to save expense, it has been provided by the Provisional Order (Marriages) Act, 1905 (*e*), that, in the case of marriages solemnised in England which appear to the Secretary of State to be invalid or of doubtful validity by reason of some informality, he may make a Provisional Order for the purpose of removing such invalidity or doubt. But such Provisional Order is of no force unless confirmed by Parliament.

The Marriage Act, 1823, following Lord Hardwicke's Act, had required that all marriages taking place in England, excepting where both the parties were

(*a*) Act of 1823, ss. 23, 24; *A.-G. v. Clements* (1871) L. R. 12 Eq. 32; *In re Martindale* [1894] 3 Ch. 193.

(*b*) *Hawke v. Corri* (1820) 2 Hagg. Consist. 280, 288; where is also discussed the question of a fraud practised

by one party on the other, as to the character of the person officiating.

(*c*) 51 & 52 Vict. c. 28.

(*d*) *E.g.*, 3 Geo. 4 (1822) c. 75; 49 & 50 Vict. (1886) c. 3; 3 Edw. 7 (1903) c. 26.

(*e*) 5 Edw. 7, c. 23.



Quakers or Jews (*a*), should be solemnised according to the rites and ceremonies of the Church of England (*b*). The injustice towards dissenters involved in this requirement led to the passing of the Marriage Act, 1836 (*c*). By this Act and the Acts amending it (*d*), all persons are enabled to be married according to such religious rites as they may think fit, or without any religious rites at all.

Before a marriage can be celebrated under the Marriage Act, 1836, and the Acts amending it, it is necessary to obtain the certificate of the superintendent registrar of marriages for the district; which certificate may be either a certificate without licence, or a certificate with licence. We propose to describe first the steps to be taken when a certificate without licence is obtained; and afterwards to point out the modifications which must be made when the certificate is one with licence.

A person intending to be married on a registrar's certificate *without licence*, delivers to the superintendent registrar of the district within which both the persons about to marry have dwelt for not less than seven days—or, if they have dwelt in different districts for that time, then to the superintendent registrar of each district—a notice, in the prescribed form, of his or her intention to marry (*e*). The notice is entered by the registrar, who is entitled to the fee of one shilling for the entry, in a book called the Marriage Notice Book, open at

(*a*) S. 31. (See now Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119); Marriage Act, 1898 (61 & 62 Vict. c. 58).  
 Marriage (Society of Friends) Acts, 1860 and 1872 (23 & 24 Vict. c. 18; 35 & 36 Vict. c. 10).)

(*b*) Act of 1823, s. 2.

(*c*) 6 & 7 Will. 4, c. 85.

(*d*) Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22); Marriage Act, 1840 (3 & 4 Vict. c. 72);

(*e*) See Act of 1836, s. 4; Marriage and Registration Act, 1856, s. 3, and Sch. (A). (As to the issue of certificates on board His Majesty's ships, see Naval Marriages Act, 1908, *post*, p. 404.)

all reasonable times, and without fee, to all persons desirous of inspecting the same (*a*). The notice must state (i.) the names and descriptions of the parties ; (ii.) the dwelling-place of each party, and the length of time during which he or she has resided there ; (iii.) the church or other building in which the marriage is to be solemnised, which must in general be within the district where one of the parties has dwelt for the period stated in the notice (*b*) ; (iv.) that the marriage is to be without licence. The person giving the notice subscribes thereto a solemn declaration, stating (i.) that he or she believes that there is no impediment of kindred or alliance or other lawful hindrance to the marriage ; (ii.) that he or she has, for the space of seven days immediately preceding, had his or her usual place of abode and residence within the district of the registrar to whom the notice is given ; (iii.) when either party, not being a widower or widow, is under the age of twenty-one, that the consent of the person whose consent to such marriage is by law required has been given, or (as the case may be) that there is no person whose consent is by law required (*c*). This notice, or a copy thereof under the hand of the registrar, is suspended or affixed by him in some conspicuous place in his office, during twenty-one successive days

(*a*) Act of 1836, s. 5.

(*b*) Act of 1840, s. 1. The building stated in the notice may, however, in the case of Quakers and Jews, be one out of the district or districts in which the parties dwell (*Ibid.* s. 5 ; Marriage and Registration Act, 1856, s. 13) ; and may also be so, in the case of other parties, where there is not within the district in which either of the parties dwells any registered building in which

the marriage may be solemnised in the form such parties desire to adopt (Act of 1840, s. 2). The building stated may also be out of such district or districts, provided it be the usual place of worship of the parties, or some of them, and not more than two miles from the district in which the notice is given (Marriage and Registration Act, 1856, s. 14).

(*c*) Act of 1840, s. 2.

next after the day when it was entered in the Marriage Notice Book (*a*).

The next step is to obtain the registrar's certificate of the notice having been duly entered. Any person whose consent would have been required by law to the marriage of the contracting parties, under an ecclesiastical licence, immediately before the passing of the Marriage Act, 1836, is authorised to forbid the issue of such certificate; and may do so by writing the word 'Forbidden' opposite the entry of the notice in the Marriage Notice Book, and subscribing thereto his or her name and place of abode, and the character in which he or she is authorised to interfere. And in case the issue of the certificate is thus lawfully forbidden, the notice and all proceedings thereon are utterly void (*b*). A *caveat* may also be entered by any person against the issue of the certificate (*c*).

Supposing, however, that, during the period for which the notice has been suspended in the office, no valid impediment to its issue has been shown to the satisfaction of the registrar, nor the issue forbidden in manner above mentioned, the certificate, after the expiration of the twenty-one days, is to be issued upon the request of the person delivering the notice (*d*); and the certificate expresses, that notice of the intended marriage in such a church or building has been duly entered, and that the issue of the certificate has not been forbidden by any person authorised to forbid it. And for this document, the registrar is entitled to receive the fee of one shilling (*e*). Then, immediately upon the certificate being issued, or at any time afterwards within three calendar months from the entry of the notice, the marriage may take place (*f*); and may

(*a*) Act of 1840, s. 4.

(*b*) Act of 1836, ss. 9, 10.

(*c*) *Ibid.* s. 13.

(*d*) *Ibid.* s. 8, and Sched.

(*B*).

(*e*) *Ibid.* s. 8.

(*f*) *Ibid.* s. 20.

be solemnised according to any one of the four following methods.

First, the marriage may be solemnised in some building certified as a place of religious worship and registered for the solemnisation of marriages, and according to such form and ceremony as the parties may think fit to adopt (*a*), subject only to the following requirements being complied with:—(i.) some registrar of the district, acting personally or by deputy (*b*), or else an ‘authorised person’ within the meaning of the Marriage Act, 1898 (*c*), must be present; (ii.) in addition, two or more credible witnesses must be present; (iii.) the marriage must be celebrated with open doors and between the hours of eight in the forenoon and three in the afternoon (*d*); (iv.) in some part of the ceremony, and in the presence of the registrar, or ‘authorised person,’ and witnesses, each of the parties must say: “I do solemnly declare “that I know not of any lawful impediment why I, “A. B., may not be joined in matrimony to C. D.”; and each of the parties must say to the other, “*I call upon these persons here present to witness that* “I, A. B., do take thee, C. D., to be my *lawful* wedded “wife (*or husband*)” (*e*).

Or, second, the marriage may be solemnised at the office of the superintendent registrar, in his presence and in that of some ‘registrar of the district,’ and

(*a*) Act of 1836, ss. 18–20. (See also Act of 1837, s. 35; Places of Worship (Registration) Act, 1855; Marriage and Registration Act, 1856, ss. 17, 24.)

(*b*) Act of 1836, ss. 17, 20. (As to appointment of a deputy, see Marriage and Registration Act, 1856, s. 16.)

(*c*) 61 & 62 Vict. c. 58, ss. 4, 6. The ‘authorised person’

is the person (usually the minister) authorised by the trustees or governing body of the building.

(*d*) Marriage Act, 1886 (49 & 50 Vict. c. 14), s. 1.

(*e*) The words in italics may be omitted in the case of a marriage celebrated in the presence of an ‘authorised person.’

also of two other witnesses, and with open doors, and between the hours aforesaid; and the parties are to make the same declaration and use the same words as in the case of marriage in a certified and registered place of worship (*a*). But at no marriage had in such office may any religious service be used, although the parties are permitted by statute to add such religious ceremony afterwards as is ordained or used by the denomination to which they belong (*b*); such latter celebration being, however, in such case, without any effect in law.

Or, third, the marriage may be solemnised according to the rites of the Church of England, the church in which the marriage is solemnised being situate within the district of the superintendent registrar by whom the certificate is issued; the consent of the minister being obtained, and the marriage being solemnised by a duly qualified clergyman according to the office of the Church (*c*).

Or, fourth, the marriage may be solemnised according to the usages of the Quakers or of the Jews, where the parties are of those persuasions respectively (*d*). A marriage may even be celebrated in accordance with the usages of the Quakers between persons of whom one or both do not belong to the Society of Friends; if such marriage is authorised by the general rules of that society (*e*).

Such, then, are the different methods in which, in a marriage upon a registrar's certificate without licence, the solemnisation may be had; but as to each of them, it is material to repeat, that the building in

(*a*) Act of 1836, s. 21.

(*b*) Act of 1856, s. 12.

(*c*) Act of 1836, ss. 1, 4;

Act of 1837, s. 36; Act of 1856, s. 11.

(*d*) Act of 1836, ss. 2, 39;

Act of 1840, s. 5; Act of 1856, s. 21.

(*e*) Marriage (Society of Friends) Acts, 1860 and 1872.

which the marriage takes place must be that specified in the notice and certificate (a).

A person intending to be married on a registrar's certificate *with licence*, gives notice to that effect and obtains a certificate as in the former case ; and the course of proceeding and the state of the law applicable to such notice and certificate are in either case the same, subject only to the following differences. First, if both the persons about to marry do not dwell in the same superintendent registrar's district, notice need not be given to the registrar of each district, but only to the registrar of the district in which one of such persons resides ; and it will be sufficient also, if the notice states how long he or she has there resided, without making any statement of the same kind with respect to the other party (b). Second, the declaration subscribed to the notice must state, that the person giving it has, for the space of *fifteen* days immediately preceding, had his or her usual place of abode and residence within the district of the registrar to whom the notice is given (c). Third, it is not requisite, that either the notice, or a copy thereof, should be suspended in the office of such registrar (d). Fourth, the certificate may be obtained after the expiration of one whole day (instead of twenty-one days) next after the entry of the notice (e).

Having obtained the certificate, the applicant next procures from the registrar a licence ; and for this the officer is entitled to receive from the applicant the sum of 1*l.* 10*s.*, over and above the amount paid for the necessary stamps on the instrument (f). Then, after the issue of the licence, and within three calendar months from the entry of the notice, the marriage may take place (g) ;

(a) Act of 1836, s. 42 ; Act  
of 1898, s. 4.

(b) Act of 1856, s. 6.

(c) *Ibid.* s. 2

(d) *Ibid.* s. 5.

(e) *Ibid.* s. 9.

(f) *Ibid.* s. 10.

(g) *Ibid.* s. 9 and Sched. C.

and it may be solemnised according to any of the several methods before stated, except that of the Church of England, subject to the rules and distinctions already laid down in respect of them (*a*). But the registrar may not grant any licence for marriage in a church or chapel of the Church of England (*b*); it being the design of the legislature not to interfere with the exclusive privilege in that respect previously vested in the archbishop and other ecclesiastical authorities.

No marriage upon the certificate of a registrar (either with or without licence), may be solemnised in any building registered and certified for religious worship, without the consent of the minister thereof, or of one of the trustees, overseers, deacons, or managers; or in any registered building of the Church of Rome, or in any church or chapel of the Church of England, without the consent of the minister thereof (*c*).

Every notice, certificate, and licence, and all proceedings thereupon under the Marriage Act, 1836, and the amending Acts, are void, unless the marriage is celebrated within three calendar months from the entry of the notice (*d*).

Every marriage under these Acts is also void, if the parties knowingly and wilfully intermarry (*i.*) in a place other than that specified in the notice and certificate, or (*ii.*) without due notice to the superintendent registrar, or (*iii.*) without certificate duly issued, or without licence (where licence is required), or (*iv.*) in the absence of the registrar of the district or of the superintendent registrar, or of the 'authorised

(*a*) Act of 1836, ss. 2, 20;  
Act of 1856, s. 21; Act of  
1898, ss. 4, 5.

(*b*) Act of 1836, s. 11.

(*c*) Act of 1856, s. 11.

(*d*) Act of 1836, s. 15; Act  
of 1837, s. 3; Act of 1856,  
Scheds. B and C.

‘person,’ where the presence of such persons respectively is required (*a*).

A valid marriage, procured by means of a wilfully false notice, certificate, or declaration, exposes the party offending to the same consequences as are provided under the Marriage Act, 1823, with regard to marriages procured by false oath or fraudulent procurement; viz. a forfeiture of all the property which would otherwise accrue to the offending party from the marriage (*b*).

All marriages celebrated in England, whether under the Marriage Act, 1823, or under the more recent Marriage Acts, are now registered. By the Marriage Acts, 1836 and 1898 (*c*), and the Births and Deaths Registration Acts, 1836 to 1874 (*d*), the duty of registering marriages is imposed on every clergyman of the Church of England (*e*), ‘authorised person’ (*f*), and registrar (*g*), by whom or in whose presence a marriage is celebrated, and upon the registering officer of the Quakers and secretary of a synagogue (*h*), in whose district or synagogue a Quaker or Jewish marriage is celebrated. Except in the case of marriages celebrated before a registrar, such registration is to be in duplicate in two books; one of which, when filled, is to be delivered to the superintendent registrar of the district, and the other retained in the custody of the parish clergyman or otherwise in the local custody of the religious body in whose building the marriage is celebrated. In the same way, the registrar transmits

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| ( <i>a</i> ) Act of 1836, s. 42.   | Registration Act, 1836, ss. 31, 33.  |
| ( <i>b</i> ) Act of 1856, s. 19.   |                                      |
| ( <i>c</i> ) 6 & 7 Will. 4, c. 85; | ( <i>f</i> ) Marriage Act, 1898, ss. |
| 61 & 62 Vict. c. 58.               | 7–11.                                |
| ( <i>d</i> ) 6 & 7 Will. 4 (1836)  | ( <i>g</i> ) Marriage Act, 1836, ss. |
| c. 86; 7 Will. 4 & 1 Vict.         | 23, 24.                              |
| (1837) c. 22; 21 & 22 Vict.        | ( <i>h</i> ) Births and Deaths       |
| (1858) c. 25; 37 & 38 Vict.        | Registration Act, 1836, ss. 31,      |
| (1874) c. 88.                      | 33; Marriage and Registration        |
| ( <i>e</i> ) Births and Deaths     | Act, 1856, s. 22.                    |



the register book kept by him, when filled, to the superintendent registrar. In addition to this, every clergyman and other person whose duty it is to register marriages, is required to deliver to the superintendent registrar of the district, in the months of April, July, October, and January, in every year, a copy, certified under his hand, and on durable materials, of all entries of marriages in such book for the current quarter ; and such certified copies are four times a year to be transmitted by the superintendent registrar to the Registrar-General (*a*). Thus the records of all marriages are eventually registered in the general registry at Somerset House.

None of the Marriage Acts extends to the Royal Family (*b*) ; nor do these Acts extend to the marriages contracted by British subjects in Scotland or in Ireland, or in any foreign country (*c*). Marriages celebrated out of England are therefore (so far as regards the *form of celebration*) considered as valid by our law, provided they are made in such form as is sufficient by the law of the place where they are solemnised ; and this is so, even though the parties have eloped out of England, on purpose to evade the forms of marriage prevailing in England (*d*). Moreover, the law of England regards any consent of third parties which may be required as a matter affecting the form of marriage, and not the capacity of the parties to contract it, which is regarded as a matter of the law of the domicile of the parties.

(*a*) Births and Deaths Registration Act, 1836, s. 34.

(*b*) Marriage Act, 1823, s. 30 ; Marriage Act, 1836, s. 45. (As to the disabilities of the Royal Family in respect of marriage, see bk. iv. pt. i. ch. iv., *post*, pp. 571–572.)

(*c*) Act of 1823, s. 31 ; Act of 1836, s. 45.

(*d*) *Scrimshire v. Scrimshire* (1752) 2 Hagg. Consist. 395 ; *Dalrymple v. Dalrymple* (1811) 2 Hagg. Consist. 54 ; *Swift v. Kelly* (1835) 3 Knapp. 257 ; *Forster v. Forster and Ber-ridge* (1863) 4 B. & S. 187. Cf. *Swift v. A.-G. for Ireland* [1912] A. C. 276.

But in order that the marriage celebrated abroad should be valid in this country, it must be a 'Christian, which means a monogamous, marriage (*a*).

In order to facilitate the celebration abroad of the marriages of British subjects, various Acts have from time to time been passed (*b*). But these Acts were repealed, and, with certain amendments, re-enacted, by the Foreign Marriage Act, 1892 (*c*), by which any marriage solemnised abroad in accordance with its provisions is declared valid as regards form, if one at least of the parties thereto is a British subject. A marriage under this Act must be celebrated with open doors in the presence of a 'marriage officer' and two witnesses; either according to the rites of the Church of England, or according to such form as the parties may think fit to adopt, provided that the same words are used as are prescribed by the Marriage Act, 1836 (*d*). A 'marriage officer,' within the meaning of this Act, is appointed either by a marriage warrant signed by a Secretary of State, or by His Majesty in Council, and is usually a British ambassador or consul, Governor or High Commissioner, or similar officer, or, in the case of marriages celebrated on board one of His Majesty's ships (*e*), the commanding officer of the ship. The place of celebration must be the official house of the marriage officer, or, in the last-mentioned case, the ship of which he is commander. The Act contains provisions as to the giving of notice, the requirement of consent in the

(*a*) *Bethell v. Hildyard* (1888) 38 Ch. D. 220; *Brinkley v. Att.-Gen.* (1890) 15 P. D. 76.

(*b*) Marriages Confirmation Act, 1823 (4 Geo. 4, c. 91); Consular Marriage Act, 1849 (12 & 13 Vict. c. 68); Consular Marriage Act, 1868 (31 & 32 Vict. c. 61); Marriage Act,

1890 (53 & 54 Vict. c. 47); Foreign Marriage Act, 1891 (54 & 55 Vict. c. 74).

(*c*) 55 & 56 Vict. c. 23.

(*d*) S. 20. See *ante*, p. 397.

(*e*) Cf. as to marriages on board a man-of-war, *Culling v. Culling* [1896] P. 116; and 42 & 43 Vict. (1879) c. 29.

case of infants, registration, and the like matters, corresponding to those applicable in the case of marriages celebrated in England. The Act also declares the validity of marriages celebrated within the lines of a British army serving abroad, by a chaplain or other person officiating under the order of the commanding officer (*a*). By the Registration of Births, Deaths, and Marriages (Army) Act, 1879 (*b*), provision has been made for the registration of marriages, celebrated abroad, of the officers and soldiers of His Majesty's land forces. The Naval Marriages Act, 1908, authorises, for the purpose of marriages in the United Kingdom, the publication of banns and the issue of certificates on board His Majesty's ships in certain cases.

The Marriage with Foreigners Act, 1906 (*c*), is intended to facilitate the marriage of British subjects with foreigners, and to secure, as far as possible, that such marriages shall not be celebrated, if any legal impediment exists according to the law of either country. In the case of such a marriage intended to be celebrated abroad, the Act provides that the party who is a British subject may, for the purpose of complying with the law of the foreign country, obtain from the registrar or marriage officer a certificate that, after proper notice has been given, no legal impediment (according to English law) has been shown to exist. The issue of such a certificate may be forbidden, or a *caveat* entered against it, in the same manner as in the case of marriages between British subjects intended to be solemnised in England.

The Act also contemplates that arrangements may

(*a*) Cf. *Waldegrave Peerage* (1837) 4 Cl. & F. 649, decided under the Marriages Confirmation Act, 1823 (since repealed).

(*b*) 42 & 43 Vict. c. 8. (And

see, as to entering in the log marriages celebrated on board a merchant ship; the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 240.)

(*c*) 6 Edw. 7, c. 40.

be made for the issue by the proper officer of a foreign country of similar certificates as to the absence of legal impediment, according to the law of such foreign country ; and empowers His Majesty, in case of such arrangements being made with any foreign country, to make regulations by Order in Council, requiring any person subject to the marriage law of such foreign country, if he intends to be married in the United Kingdom to a British subject, to give notice to the person by whom or in whose presence the marriage is to be solemnised, of the fact that he is so subject, and forbidding any person who has received such notice, to solemnise or permit the solemnisation of such marriage, except on the production of such certificate.

As regards marriages celebrated abroad within any of His Majesty's possessions, it is provided, by the Colonial Marriages Act, 1865 (*a*), that any law passed by the legislative body in such possession for the purpose of establishing the validity of any marriage solemnised therein, shall give to such marriage the same validity out of the limits of such possession as it would, previously to the Act, have given within those limits ; provided only that the parties to such marriage were competent to contract the same according to the law of England. The Colonial Marriages (Deceased Wife's Sister) Act, 1906, has already been referred to (*b*).

II. *The legal effect of the relation of husband and wife.*  
—[For some purposes, the husband and wife become, by their marriage, a single person in the eye of the law (*c*) ; and it was accordingly a principle of the old common law, that a man could not grant anything to his wife, or enter into any covenant with her (*d*). No

(*a*) 28 & 29 Vict. c. 64.

(*b*) 6 Edw. 7, c. 30. (See  
*ante*, p. 388, n. (*e*).)

(*c*) Co. Litt. 112 a.

(*d*) *Beard v. Beard* (1744)

3 Atk. 72 ; *Jupp v. Buckwell*  
(1888) 39 Ch. D. 148.

[action could be brought by either of them against the other ; and all contracts between them, made before marriage, were avoided, or at least suspended, by their intermarrying (*a*). The husband, however, might have granted to or contracted with a trustee for his wife ; and, by conveying land to a third person to her use, he might have conferred upon her the legal estate in the land (*b*). Also, he might have devised or bequeathed anything to her by will ; for his will did not take effect till the union was severed by his death (*c*). Also, where the wife acted in the execution of a mere power or authority, she might have conveyed an estate to her husband ; *e.g.*, if she had power under a will to sell, she might have effectually sold to him (*d*). And she might have been agent for her husband ; for that implied no separation from, but was rather a representation of, her lord (*e*).]

But the principle of the unity of husband and wife was, apparently, even by the common law, inapplicable as between a Queen Regnant and her Consort ; though in two cases it was deemed necessary to exclude by statute the Consort from any interest in the Queen's property (*f*). And the wife of the King of England "is of capacity to grant and to take, sue and be sued, "as a *feme sole*, at the common law" (*g*).

Moreover, it long remained a fundamental rule in our law of evidence, that husbands and wives could not in trials of any sort, whether civil or criminal, be received as witnesses for or against each other (*h*) ; excepting that, in a criminal prosecution against the

(*a*) *Nedham's Case* (1611) 8 Rep. 136 a.

(*b*) See *ante*, vol. i. p. 432.

(*c*) Co. Litt. 112 a.

(*d*) *Ibid.*

(*e*) *M'George v. Egan* (1839) 5 Bing. N. C. 196.

(*f*) 1 Mar. (1554) st. 3, c. 2 ; 3 & 4 Vict. (1840) c. 3.

(*g*) Co. Litt. 133 a.

(*h*) *Hawkins*, P. C. b. 2, ch. 46, s. 16 ; 1 *Hale*, P. C. 301 ; *Wedgwood v. Hartley* (1839) 10 A. & E. 619.

husband for treason, or for violence to the person of his wife, the evidence of the latter was admitted (a). But in modern times, it came to be deemed expedient greatly to relax these rules of the earlier law; and accordingly, by the Evidence Amendment Act, 1853, and the Evidence Further Amendment Act, 1869 (b), the husbands and wives of the parties to *civil* proceedings (including proceedings instituted in consequence of adultery) were made both competent and compellable to give evidence.

But, as regards criminal proceedings, the incompetence of husband and wife to give evidence has, even now, been only partially removed. In the first place, in a small number of cases, husband and wife have been made both competent and compellable witnesses. This class comprises proceedings which are only in form criminal; such as indictments for the non-repair of highways (c), and also proceedings under the Married Women's Property Acts, 1882 and 1884 (d), in respect of offences by husband and wife against each other's property. In the latter case, however, a defendant is not compellable to give evidence. In the second place, in a considerable class of cases, husband and wife are competent witnesses both for the prosecution and for the defence, but are not compellable to give evidence. This class includes (*inter alia*) proceedings under the Offences against the Person Act, 1861, the Criminal Law Amendment Acts, 1885 to 1912, and the Children Act 1908 (e).

(a) *R. v. Azire* (1725) Str. 633; Hale, *ubi sup.*; 1 East, P. C. 444, 454.

(b) 16 & 17 Vict. c. 83; 32 & 33 Vict. c. 68.

(c) Evidence Act, 1877 (40 & 41 Vict. c. 14).

(d) 45 & 46 Vict. c. 75, ss. 12, 16; and 47 & 48 Vict.

c. 14. (See *Reg. v. Brittleton* (1884) 12 Q. B. D. 266.)

(e) 24 & 25 Vict. c. 100, ss. 48–55; 48 & 49 Vict. c. 69; 8 Edw. 7, c. 67, s. 27, re-enacting the provisions of 57 & 58 Vict. c. 41. (And see 61 & 62 Vict. c. 36, s. 4, and Schedule.)

Thirdly, by the Criminal Evidence Act, 1898 (a), husbands and wives are made competent witnesses *for the defence* as regards criminal proceedings generally ; but they cannot be compelled to give evidence. It must also be remembered that, as regards proceedings, whether civil or criminal, the rule still holds, that no husband or wife is compellable to disclose any communication made to him or her by the other during the marriage (b) ; and of course, the rule applies to husbands and wives, as well as other persons, that no one can be compelled to give evidence which would tend to show that he or she has been guilty of any criminal offence, or of adultery.

[And, though the wife was antiently considered in law for many purposes as the same person with her husband, she was for some purposes held to be a distinct person ; yet, even so, she was deemed subordinate, being under his cover, protection, and influence. She was therefore called, in our law French, a *feme covert*, or in Latin, *fœmina viro cooperta* ; and her condition during marriage was and still is called her *coverture* (c).] We have now to consider the effect of such coverture, in respect (i.) of the wife's person, (ii.) of her property, contracts and other transactions. Further, we shall consider (iii.) the extent to which the husband is or may be liable for contracts entered into by her, and for her torts.

(i.) *As to the wife's person.*—It was formerly thought, that the custody of this belonged of right to her husband (d) ; and by some antient authorities it was even considered that he might give her moderate

(a) 61 & 62 Vict. c. 36, s. 1.

(b) Evidence Amendment Act, 1853, s. 3 ; Criminal Evidence Act, 1898, s. 1 (d).

(c) But see as to the true

meaning of the phrase *feme covert*, Pollock & Maitland, *History*, ii. 404 (n.).

(d) *In re Cochrane* (1840) 8 Dowl. 635.

correction (*a*), though in the reign of Charles the Second, the power of correction began to be doubted (*b*). But in more recent times it has been held that a husband has no such right to the custody of his wife as a parent has to the custody of a child ; and the Court has refused to grant a *habeas corpus* on the application of a husband, in order to restore to his custody a wife who was voluntarily living apart from him (*c*). So, too, a husband is not entitled to imprison his wife in order to enforce restitution of conjugal rights (*d*) ; nor can a decree for such restitution be now enforced by attachment (*e*). But it is possibly the case that our law still permits a husband to restrain his wife of her liberty, in case of gross misbehaviour ; or at any rate as a means of preventing such misbehaviour (*f*).

(ii.) *As to the wife's property, contracts and other transactions.*—The position of a married woman in these respects at the present day depends on (1) the rules of the common law, (2) the rules of equity which from the end of the seventeenth century were superimposed upon the common law rules and largely overrode them, (3) the changes made by statute since the middle of the nineteenth century. It will be convenient to deal with the subject in this order.

(1). *The rules of the common law.*—By the common law, any freehold estate of which the wife was seised at the time of the marriage, or of which she became seised afterwards, became (subject to the exceptions presently to be mentioned) by law vested in her husband and herself during the coverture ; and the

(*a*) *Sir T. Seymour's Case* (n.d.) F. Moore, 874 ; F. N. B. 80.

(*b*) *Anon.* (1663) 1 Sid. 113 ; *Lord Leigh's Case* (1674) 3 Keb. 433.

(*c*) *R. v. Leggatt* (1852) 18 Q. B. 781.

(*d*) *R. v. Jackson* [1891] 1 Q. B. 671.

(*e*) Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68).

(*f*) *Child v. Hardyman* (1731) 2 Str. 875 ; *R. v. Jackson, ubi sup.*



husband was entitled to the profits, and had the sole control and management (*a*), though he could not, save under the specific provisions of a statute, convey or charge the wife's freehold interest for any longer period than while the marriage continued (*b*). And if the wife was seised in actual possession at any time during the marriage of an estate of inheritance, whether in fee simple or in fee tail, and there was at any time a child of the marriage born alive and capable of inheriting the property, then the husband, upon his wife's decease, became solely seised of such estate for his life; and was said in that case to be *tenant by the curtesy of England* (*c*). But, save to the extent of these limited rights of the husband, the freeholds of the wife were not affected by the marriage.

As regards the alienation of the wife's freeholds, there was originally no mode by which they could, even with the husband's concurrence, be effectually conveyed during the coverture; for the rigour of the antient law declared the wife incapable, in any case, of binding herself or her heirs in any direct mode of alienation (*d*). Indirect modes of alienation were, however, introduced at an early date; and, for a long time, the ordinary mode was the *fine*, in the course of levying which the wife was privately examined as to whether her act was voluntary. The Fines and Recoveries Act, 1833, substituted for this mode of alienation a deed duly acknowledged by the wife; her husband concurring in, and not merely consenting to, the deed. Where this mode of alienation is still

(*a*) 1 Wms. Saund. 253, n. 4; *Robertson v. Norris* (1845) 11 Q. B. 916.

(*b*) Bac. Ab. *Leases* (C.); 2 Wms. Saund. 180, n. (*q*).

(*c*) Litt. s. 35. For a fuller account of tenancy by the curtesy, see *ante*, vol. i. pp.

167-168.

(*d*) A custom for a married woman to convey with the consent of her husband, but without separate acknowledgment, is bad (*Johnson v. Clark* [1908] 1 Ch. 303).

required, the acknowledgment must be made before, and the wife privately examined by, a judge of the High Court, or one of the perpetual commissioners appointed for taking married women's acknowledgments, or a special commissioner (a).

As regards the leaseholds of which the wife was possessed at the time of her marriage, or which accrued to her during coverture, the husband became, with the exceptions presently to be noticed, by the common law and by force of the marriage, possessed of them, in her right (b); and he was not only entitled to the profits and management thereof during their joint lives, but he might also dispose of them as he pleased, by any act during the coverture. They were even liable for his debts; and, if he survived her, they were absolutely his own (c). But, if she survived him, he could not bequeath them by his will (d); for, on his death, they remained to her by virtue of her original title, and did not go to his executors or administrators. And the rights of the husband did not extend to property held by the wife *in autre droit*; as in the capacity of executrix (e).

The chattels personal of the wife belonging to her at the time of the marriage, or accruing to her during coverture, became, by the common law, with the exception of *choses in action*, the absolute property of the husband (f); but this again did not apply to property to which the wife was only entitled *in*

(a) Fines and Recoveries Act, 1833, ss. 77–84; Conveyancing Act, 1882, s. 7. (For a fuller account of the process, see vol. i. pp. 451–452.)

(b) Co. Litt. 46 b, 300 a, 351 a; *Wallis v. Harrison* (1839) 5 M. & W. 142.

(c) Com. Dig. *Baron and*

*Feme*, E.

(d) *Bracebridge v. Cook* (1572) Plowd. 418; Com. Dig. *ubi sup.*

(e) 1 Roll. Ab. 88.

(f) Co. Litt. 351 b; *Ayling v. Whicher* (1837) 1 Nev. & Per. 416; *Carne v. Brice* (1840) 7 M. & W. 183.

*autre droit* (a). The wife's *choses in action* did not by the common law become the husband's until he recovered them by law, or reduced them into possession (b); and if he died before doing so, they remained or survived to the wife surviving her husband. But if she should have predeceased her husband, then, as he was, by the common law, entitled to obtain administration of her effects for his own benefit, he, upon becoming administrator of his wife's estate, became the owner of them in right of that title, and for his own benefit; subject only to the debts (if any) of the wife. And if he, having so survived, should have died before the *choses* were reduced into possession, then his legal personal representatives, on taking out administration to the wife, might recover them, for the benefit of the deceased husband's estate; subject only to the debts of the wife (c). If the wife's *chose in action* was reversionary, and therefore incapable of being reduced into possession, neither husband nor wife, nor both together, could effectually dispose thereof during the coverture (d). The *paraphernalia* of the wife: that is, her apparel and ornaments suitable to her rank and degree, if not disposed of by the husband in his lifetime, remained to her, if she survived him, and did not pass to the husband's representatives. But they were liable for his debts (e).

A married woman might at common law act independently of her husband in all matters *in autre*

(a) Went. Off. Ex. 7.

(b) Co. Litt. 351 b; *Fitzgerald v. Fitzgerald* (1850) 8 C. B. 592.

(c) *Smart v. Tranter* (1890) 43 Ch. D. 587; *Waller v. Atkinson* [1898] 1 Ch. 637; *Elliott v. North* [1901] 1 Ch. 424.

(d) *Purdew v. Jackson* (1823) 1 Russ. 1.

(e) *Tasker v. Tasker* [1895] P. 1. Under the present law, the wife's wearing apparel, &c., purchased with money supplied by the husband for the purpose, is *prima facie* her separate property, and not subject to his debts. (*Quære* whether *paraphernalia* can now exist (*Masson v. De Fries* [1909] 2 K. B. 831).)

*droit* ; as where she was, at the time of her marriage, executrix, or exercised a mere authority or power. Yet a married woman could not, without her husband's consent, accept the office of executrix, so as to make him liable for her *devastavit* ; though, as between herself and her co-executor, a payment in good faith to a married woman who was acting without such consent was held valid (a). But in respect of transactions on her own account, her coverture used to subject her to a variety of disabilities.

Thus, first, she was incompetent, as we have previously said (b), without her husband's consent, to make a will, either of lands or of chattels (c), and incapable generally of contracting, or of doing any other act which would bind either herself or her husband (d), unless as his agent, by his express or implied authority (e) ; and acts done by her of her own authority with that intention were merely void. But a married woman might contract as a *feme sole* so as to bind herself in case her husband were civilly dead, or where she carried on trade in the City of London on her own sole account, and without any interference on the part of her husband (f) ; (in which last case she might even be made bankrupt).

Second, she was incapable of suing or being sued without her husband being joined, except in a few cases in which she was treated as a *feme sole* ; as, for

(a) Com. Dig. *Baron and Feme* (P) ; Co. Litt. 112 a ; *Pemberton v. Chapman* (1858) E. B. & E. 1056.

(b) See *ante*, pp. 311–312.

(c) *Smart v. Tranter* (1890) 43 Ch. D. 587 ; *Waller v. Atkinson* [1898] 1 Ch. 637 ; *Elliott v. North* [1901] 1 Ch. 424.

(d) Co. Litt. 112 b.

(e) *Lane v. Ironmonger* (1844) 13 M. & W. 368 ; *Brown v. Ackroyd* (1856) 5 El. & Bl. 819 ; *Johnson v. Sumner* (1858) 3 H. & N. 261 ; *Debenham v. Mellon* (1880) L. R. 6 App. Ca. 24.

(f) *Lavie v. Phillips* (1765) 3 Burr. 1776 ; *Caudell v. Shaw* (1791) 4 T. R. 361.

instance, where her husband was civilly dead (*a*). This incapacity existed even in the case of actions in respect of her separate estate (*b*), of an estate of which she was executrix (*c*), and of her contracts made in the course of her separate trade (*d*).

(2). *The rules of equity*.—These rules of the common law were largely modified by the principles of equity, even before any of the statutes, which will next be mentioned, were passed ; and these principles, subject to the Married Women's Property Acts, are still applicable to a married woman's property and contracts, and are, indeed, largely embodied in the Acts.

Contracts between husband and wife, and grants by either party to the other, being sufficiently evidenced, were effectual in equity (*e*) ; trusts also in favour of the wife, whether created by the husband or by a stranger, were sustained in equity. And though by the old common law her property (with the qualifications already stated) vested in her husband in such manner that she could have no separate property ; yet, in contemplation of equity, she had always a separate and independent estate in whatever property was secured to her through the medium of a trustee, provided the intention in that behalf of the grantor was distinctly declared (*f*). And, as it is a rule in equity that a trust shall never fail for want of a trustee, it followed that, where the intention to give a married woman property for her *separate use* was sufficiently declared, such gift would be effectual, and the property would be her separate estate ; even though her donor should have omitted to appoint any trustee. And so, if no trustee

(*a*) *Ramsden v. Brearley*  
(1875) L. R. 10 Q. B. 147.

(*b*) *Hancocks v. Labache*  
(1878) 3 C. P. D. 197.

(*c*) *Mounson v. Bourn*  
(1641) Cro. Car. 519.

(*d*) *Caudell v. Shaw* (1791)  
4 T. R. 361.

(*e*) *Stanning v. Style* (1734)  
3 P. Wms. 334.

(*f*) *Fonblanque, Equity*,  
94 ; *In re Tarsey's Trust*  
(1866) L. R. 1 Eq. 561 ;  
*Massy v. Rowen* (1869) L. R.  
4 H. L. 288.

was appointed, though the property vested at law in the husband, yet the court of equity, in such a case, treated the husband himself as her trustee (*a*). It was this equitable principle of the wife's separate estate which formed the model of the legal separate property created by the Married Women's Property Acts, 1870 and 1882.

As regards the property of a married woman which was not settled to her separate use, although the courts of equity followed the common law, so far as to allow the husband to claim it as his own; yet these courts would not assist the husband's claim, where such assistance was necessary, except upon the condition of his making an adequate provision for her and her children out of the fund. Later, the wife herself was permitted to take proceedings as plaintiff in order to have this provision made out of any property over which a court of equity had jurisdiction (*b*). The wife's right to this provision was known as her *equity to a settlement*.

Equity would also allow the separate estate of a married woman to be conveyed or charged by her at her pleasure; and that either *inter vivos* or by will. And such property was also subject in equity to her debts contracted on the faith of her separate estate (*c*).

One of the most striking principles introduced by equity with regard to married women's property is still of great importance. Gifts of property to the separate use of a married woman, are often accompanied with a clause in *restraint of anticipation*; that is, a proviso against her making any assignment of her

(*a*) *Bennet v. Davis* (1725) 2 P. Wms. 316.

(*b*) *Elibank v. Montolieu* (1799) 5 Ves. 737; 1 W. & T. L. C. 621; *Re Briant* (1888) 39 Ch. D. 471.

(*c*) *Bac. Ab. Baron and Feme*, 507; *Taylor v. Meads* (1865) 34 L. J. Ch. 203; *Pike v. Fitzgibbon* (1881) 17 Ch. D. 454.

interest, by way of anticipation of the income, or by any disposition of the capital, during the coverture. And such a proviso, notwithstanding the general rule invalidating restrictions on alienation, was held effectual in courts of equity; and therefore at the present day is so in all the courts (*a*). To such an extent is this so, that for her debts contracted on the faith of her separate estate, nay, even for her own active frauds (*b*), the property so restrained cannot, apart from statute, be made liable. The restraint continues only during coverture; though it will, unless put an end to by the woman while discovert, revive on a subsequent marriage (*c*). But property subject to a restraint on anticipation will not, even if the woman becomes discovert, become liable to payment of debts contracted by her while covert (*d*). Nor can a judgment against a married woman in respect of a debt contracted before coverture be enforced by way of equitable execution against her separate property restrained from anticipation; unless the restraint is imposed by a settlement made by herself of her own property (*e*).

(3). *Changes made by statute.*—But the rules of the common law on the subject of a married woman's property have been profoundly modified, and the rules of equity largely adopted and extended, by several important statutes; though it is still necessary that those rules, for certain purposes, should be known. Of these statutes we must now proceed to give some account.

(*a*) *Woodmeston v. Walker* (1831) 2 Russ. & M. 197; *Brown v. Pocock* (1831) *ibid.* 210; *Harnett v. Macdougall* (1845) 8 Beav. 187; *Bolitho v. Gidley* [1905] A. C. 98.

(*b*) *Jackson v. Hobhouse* (1817) 2 Mer. 483; *Ellis v. Johnson* (1886) 31 Ch. D. 537.

(*c*) *Tullett v. Armstrong* (1839) 1 Beav. 1.

(*d*) *Barnett v. Howard* [1900] 2 Q. B. 784; *Brown v. Dimbleby* [1904] 1 K. B. 28.

(*e*) M. W. P. Act, 1882, s. 19; *Birmingham Excelsior Society v. Lane* [1904] 1 K. B. 35.

First, then, by the Married Women's Reversionary Interests Act, 1857, commonly called Malins' Act (*a*), a married woman is enabled to dispose of her reversionary interests in personal estate, whether vested or contingent, unless restrained by the instrument under which she was entitled thereto, or unless they were secured to her by her own marriage settlement. The disposition had to be by deed in which her husband concurred, and which was duly acknowledged in the manner required by the Fines and Recoveries Act, 1833, with regard to her conveyance of real estate.

Again, by the Matrimonial Causes Act, 1857, a wife judicially separated from her husband is to be considered as a *feme sole* for the purposes of contracts made and property acquired subsequently to the separation, and of suing and being sued (*b*) ; and a wife who obtains a protection order under that Act (*c*), on the ground of desertion, is deemed, during the continuance of such order, to be, and during the desertion to have been, in the same position as if she had obtained a decree of judicial separation.

And, under the Summary Jurisdiction (Married Women) Act, 1895 (*d*), a married woman whose husband has been convicted of an aggravated assault upon her, within the meaning of the Offences against the Person Act, 1861 (*e*), or of such other assault as mentioned in the Act, or has deserted her, or by his persistent cruelty or neglect to provide maintenance for her and her infant children, has caused her to leave him, may obtain an order from a court of summary jurisdiction to the effect that she be no longer bound to cohabit with him ; and such order, while in force,

(*a*) 20 & 21 Vict. c. 57, s. 25.

ss. 21, 25. (See also Matrimonial Causes Act, 1857, s. 8 ; and 27 & 28 Vict. (1864) c. 44.)

(*b*) 21 & 22 Vict. c. 108,

(*c*) *Ibid.* s. 21.

(*d*) 58 & 59 Vict. c. 39.

(*e*) 24 & 25 Vict. c. 100.



has all the effects of a decree of judicial separation on the ground of cruelty.

The greatest change in the law relating to married women's property has, however, been made by the Married Women's Property Acts of 1870 and 1882 (*a*). By the former of these Acts, it was provided that where any freehold, copyhold, or customaryhold property should descend during the marriage upon any woman who was married after the passing of the Act (*viz.*, 9th August, 1870) as heiress or co-heiress of an intestate, or where such woman should, during her marriage, become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding 200*l.* under any deed or will, the rents and profits of the real estate, and the absolute interest in the personal estate, should, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and that her receipts alone should be a good discharge for the same.

But this Act is now superseded by the Married Women's Property Act, 1882, under which, as from the 1st day of January, 1883, every woman who is married on or after that date is to hold as her separate property all real and personal estate, either then already belonging to her, or afterwards coming to her in any manner ; including wages, earnings, and gains earned or made by her in any occupation which she carries on separately from her husband. And she may dispose, by will or otherwise, of all such property in the same manner as if she were a *feme sole* (*b*). And any woman already married before the 1st day of January, 1883, is to hold as her separate property, and to have the like power of disposition over, all property, real or personal, the title to which, whether vested or contingent, has accrued to

(*a*) 33 & 34 Vict. c. 93 ;      (*b*) Act of 1882, s. 1 (1).  
45 & 46 Vict. c. 75.

her after that date (a) ; including such wages, earnings, and gains as aforesaid.

The Married Women's Property Act, 1882, has further provided, in continuation and amplification of the like provisions contained in the Married Women's Property Act, 1870, that a wife (whenever married) may effect an insurance upon her own or her husband's life for her separate use (b), and shall also acquire property independently of her husband in such deposits as she shall have made in a savings bank, or other bank, or as she shall have invested in the funds, in a joint-stock company, or in an industrial, provident, friendly, benefit building, or loan society ; provided always, that she shall not have used her husband's moneys without his consent, and shall not have deposited or invested such moneys in fraud of his creditors (c).

Further, by the Married Women's Property Act, 1882, a married woman is capable of rendering herself liable in respect of her separate property on any contract, and of suing and being sued in contract or in tort or otherwise, as if she were a *feme sole* ; without her husband being joined (d). Still, no husband or wife can, even since the Act, sue the other for a tort ; except that the wife may bring an action against her husband for the protection and security of her own separate property (e). A wife may also act and sue and be sued as executrix or administratrix or trustee ; without her husband being joined (f). And a married woman who is a trustee or personal representative (whether or not she is a bare trustee) can convey

(a) *Reid v. Reid* (1886) 31 Ch. D. 402 ; *Stockley v. Parsons* (1890) 45 Ch. D. 51.

(b) Married Women's Property Act, 1882, s. 11.

(c) *Ibid.*, ss. 6-10.

(d) *Ibid.*, s. 1 (1), (2).

(e) *Ibid.*, s. 12 ; *Symonds v. Hallett* (1883) 24 Ch. D. 346 ; *Larner v. Larner* [1905] 2 K. B. 539.

(f) Act of 1882, s. 18.

without the concurrence of her husband, or the necessity of acknowledgment—in the same way as if she were a *feme sole* (a).

It was held under the Married Women's Property Act, 1882, that a married woman having no separate estate could not bind herself by contract, so as to render liable property subsequently acquired by her (b); and that the will of a married woman was not effectual to dispose of property acquired by her after she became discovert, unless re-executed (c). But this rigid construction has been overruled by the Married Women's Property Act, 1893 (d), which provides that every contract entered into by a wife (otherwise than as agent) after the 5th December, 1893 (e), shall be deemed to be a contract entered into by her with respect to and to bind her separate property; whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract. And her contract so entered into will bind all separate property which she may at that time or thereafter be possessed of or entitled to; and will also be enforceable, by process of law, against all property which she may thereafter, while discovert, be possessed of or entitled to—not being, of course, property settled to her separate use without power of anticipation. But if a married woman enters into

(a) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 16; (Married Women's Property Act, 1907, s. 1. See also *Brooke's and Fremlin's Contract* [1898] 1 Ch. 647; *Howgate's and Osborn's Contract* [1902] 1 Ch. 451; *West's and Hardy's Contract* [1904] 1 Ch. 145; *Harkness's and Allsopp's Contract* [1896] 2 Ch. 358.

(b) *Palliser v. Gurney* (1887)

19 Q. B. D. 519.

(c) *Re Price* (1885) 28 Ch. D. 709.

(d) 56 & 57 Vict. c. 63, s. 1.

(e) The contract must have been entered into after the commencement of the Act. An acknowledgment after the Act of a contract made before is inoperative for this purpose (*Re Wheeler* [1904] 2 Ch. 66).

a contract as agent for, and with the authority of, her husband, she incurs no liability in respect of her separate estate ; even though the fact of the agency be unknown to the other party to the contract (a).

The same Act also provides, that the rule established by the Wills Act, 1837 (b), by which a will is to be construed as if made immediately before the death of the testator, shall apply to the will of a married woman, whether she was or was not entitled to any separate property at the time of making it ; and that such will shall not require to be re-executed or republished after her husband's death. A will made by a married woman will now, therefore, operate upon all property which she may leave at her decease ; whether her husband is then living or not.

A married woman was formerly, except by the custom of London, exempt from the bankruptcy laws even though she had separate estate (c) ; and this exemption continues, notwithstanding the Married Women's Property Acts, 1882 to 1907 (d), unless she carries on a trade or business, whether separately from her husband or not. In such a case, if a final judgment or order has been obtained against her (whether or not expressed to be payable out of her separate property), the judgment or order is available for bankruptcy proceedings against her by a bankruptcy notice as though she were personally bound to pay the judgment debt or sum ordered to be paid (e).

Apart from statute, the Court had no power to lift off the restraint on anticipation ; even when it was for

(a) *Paquin v. Beauclerk* [1906] A. C. 148. (Cf. *Beer v. Bell* [1906] W. N. 114.)

(b) 1 Vict. c. 26, s. 24.

(c) *Ex parte Jones* (1879) 12 Ch. D. 484.

(d) *Re Gardiner* (1887) 20 Q. B. D. 249 ; *Re a Debtor*

[1898] 2 Q. B. 576.

(e) Married Women's Property Act, 1882, s. 1 (5) ; Bankruptcy and Deeds of Arrangement Act, 1913, s. 12 (1), (2). (See *ante*, pp. 260-261.)

the woman's own clear benefit to do so (a). But, by the Conveyancing Act, 1911, the Court is now enabled, with her consent, to bind her interest in any property which she is restrained from anticipating or alienating, or which she is by law unable to dispose of, when it is for the wife's benefit that it should be bound (b). By the Trustee Act, 1893 (c), re-enacting a similar provision of the Trustee Act, 1888 (d), the Court may now impound the interest of a married woman restrained from anticipation in a trust fund, by way of indemnity to a trustee who has committed a breach of trust at her instigation or request, or with her consent in writing. And by the Married Women's Property Act, 1893 (e), the costs of litigation instituted by her or on her behalf may now be ordered to be paid out of such property. Further, when a married woman is adjudged bankrupt, income of property which she is restrained from anticipating may now be made available by order of the Court for distribution among her creditors (f).

The old law, in consideration of a married woman's incapacity to sue, gave her certain special privileges or exemptions. Thus, as regards rights and causes of action accruing to her during coverture, the Statutes of Limitation did not begin to run until the determination of the coverture; but, since the Married Women's Property Act, 1882, this exemption, at least

(a) *Robinson v. Wheelwright* s. 6.  
(1856) 6 D. M. & G. 535.

(b) S. 7, re-enacting with modifications the provisions of the Conveyancing Act, 1881, s. 39. (See *Harrison v. Harrison* (1889) 40 Ch. D. 418; *Re Blundell* [1901] 2 Ch. 224.)

(c) 56 & 57 Vict. c. 53, s. 45.

(d) 51 & 52 Vict. c. 59,

(e) S. 2; *Hood-Barrs v. Cathcart* [1894] 3 Ch. 376; *Hood-Barrs v. Cathcart* [1895] 1 Q. B. 873. (And see *Hood-Barrs v. Heriot* [1897] A. C. 177.)

(f) Bankruptcy and Deeds of Arrangement Act, 1913, s. 12 (3).

as regards all actions falling within that Act, has been abolished (a).

(iii.) *As to the husband's liability for contracts entered into by the wife, and for her torts.*—A husband is not liable upon contracts entered into by his wife during the marriage otherwise than as his agent; and the mere fact of marriage does not make the wife the agent of the husband so as to enable her to pledge his credit (b). Where husband and wife are living together and she is managing his household, his authority to her to act as his agent, to that extent, will *primâ facie* be presumed; though the presumption is capable of being repelled by special circumstances, as by the fact of his supplying her with ready money to defray household expenses, or by a simple determination of her agency (c). But where the husband has by his conduct, as for instance by paying bills, held her out to a tradesman as his agent, he cannot, as against such tradesman, determine her agency; except by giving him actual notice not to trust her (d).

Again, when a husband has turned his wife out of doors and deserted her, or she has left him in circumstances which justify her in doing so, the wife has by necessity an authority to pledge the husband's credit for necessaries for herself and their children, of whom she has the lawful custody (e). But the husband incurs no such liability—(1) if the separation be against his will and without sufficient excuse arising from his ill-treatment (f); (2) if she be dismissed

(a) *Weldon v. Neal* (1884) 51 L. T. 289; *Lowe v. Fox* (1885) 15 Q. B. D. 667.

(b) *Manby v. Scott* (1663) 1 Sid. 109; *Debenham v. Mellon* (1880) 5 Q. B. D. 394; L. R. 6 App. Ca. 24.

(c) *Morel v. Westmoreland* [1904] A. C. 11.

(d) *Debenham v. Mellon*, *ubi sup.*

(e) *Montague v. Benedict* (1825) 3 B. & C. 635; *Bazeley v. Forder* (1868) L. R. 3 Q. B. 559; *Wilson v. Glossop* (1888) 20 Q. B. D. 354.

(f) *Atkyns v. Pearce* (1857) 2 C. B. (N.S.) 763.

from him for adultery (unless committed with his connivance), or if, during the separation, she commit adultery (a); (3) if she has agreed to accept from him a certain allowance for her maintenance during separation, and the allowance is regularly paid, or if sufficient provision is otherwise made for her while they are living apart (b); or (4), in the case of a judicial separation, if alimony has been decreed to the wife, and it is paid (c).

At common law, a husband was liable upon his wife's contracts made before marriage, and also for her torts whether committed before or during the marriage; but his liability, unless enforced by action during the marriage, came to an end with its determination (d), though he would be liable, as her administrator, to the extent of the assets received by him as such (e). An action to enforce such liability during the coverture was required to be brought against husband and wife jointly (f). But, as the law now stands, by the Married Women's Property Act, 1882 (g), the husband thus sued jointly with his wife in respect of a cause of action arising against her *before* the marriage, is liable only to the extent of such assets as he received or might (but for his own default) have received with her; and if he received none, then he will have his costs of defence, and the judgment for the debt or damages will be separate against the wife, and may be satisfied out of the wife's separate estate, if she has any (h). A

(a) *Cooper v. Lloyd* (1859) 6 C. B. (N.S.) 519.

(b) *Johnson v. Sumner* (1858) 3 H. & N. 261; *Eastland v. Burchell* (1878) 3 Q. B. D. 432.

(c) Matrimonial Causes Act, 1857, s. 26.

(d) *Heard v. Stamford* (1735) 3 P. Wms. 409; *Capel v. Powell* (1865) 34 L. J. C. P. 168.

(e) *Turner v. Caulfield*

(1879) Ir. L. R. 7 Ch. 347.

(f) *Mitchinson v. Hewson* (1797) 7 T. R. 348; *Beck v. Pierce* (1889) 3 Q. B. D. 316.

(g) Ss. 14, 15. (The husband may now be sued separately; even when there is an unsatisfied judgment against the wife in respect of the same liability (*Beck v. Pierce*, *ubi sup.*.)

(h) *Scott v. Morley* (1887) 20 Q. B. D. 120.

husband is, however, still liable, so long as the coverture lasts, jointly with his wife, for her torts (though not, except as aforesaid, for her contracts) committed *during* the coverture (a). But inasmuch as a married woman is incapable of binding her husband (except as his agent) by contract, it has been laid down that no action lies against husband and wife in respect of a wife's fraud so directly connected with a contract purported to be made by her that the claim in tort would in substance be an enforcement against him of the contractual liability; as where she obtained a loan of money by a false representation that she was unmarried (b). Obviously, the husband's liability has not been increased in this respect by the extended contractual powers now conferred on the wife.

Before concluding the subject of the legal effect of the relation of husband and wife, it will be desirable to consider, although briefly, the subject of *marriage settlements*, and the subject of *separation deeds* between husband and wife.

1. MARRIAGE SETTLEMENTS.—When a marriage is contemplated, it is a common practice for the intended husband to make a settlement for the benefit of the intended wife. Where the husband is entitled to real estate, this provision usually takes the form of a small rent-charge, called 'pin money,' which is to be paid to the wife during her husband's life, and is intended for her private purposes, such as dress, and a larger rent-charge called a 'jointure,' which is to be paid to her after his death, in the event of her surviving him. A jointure

(a) *Seroka v. Kattenburg* (1886) 17 Q. B. D. 177; *Earle v. Kingscote* [1900] 2 Ch. 585; *Beaumont v. Kaye* [1904] 1 K. B. 292. The husband's liability is put an end to by a decree for judicial separation or divorce; even

if such decree is obtained after the commencement of the action of tort (*Cuenod v. Leslie* [1909] 1 K. B. 880).

(b) *Fairhurst v. Liverpool Adelphi Loan Association* (1854) 23 L. J. Ex. 163.



is usually expressed to be in lieu of dower and freebench. These rent-charges were formerly secured by limitations of the husband's real estate to special trustees for long terms of years ; but since the Conveyancing Act, 1881 (a), this has become unnecessary. If there is hereditary rank or a title to be supported, or if it is in contemplation to 'found a family,' the settlement generally contains also provisions for entailing the bulk of the landed estate on the issue of the marriage, by limiting it to the husband for life, and after his death, to the first and other sons successively in tail male, and then to the daughters in tail, with a provision for raising a sum of money to serve as portions for younger children. On the intended wife's part, if she possesses property of her own, and the amount is large, a settlement thereof is frequently made, providing sufficiently for the wife, and conferring beneficial interests therein on the husband, and providing for the children of the marriage ; and (in the case of the failure of issue) providing for the return of the property in whole in or part to the wife herself or to her relations, subject always to the estates or interests which may have taken effect.

A marriage settlement may be made, either in contemplation of the marriage, or after the marriage has taken place. An ante-nuptial settlement is made on what the law deems a valuable consideration ; viz., the future marriage. So that such a settlement cannot, in the absence of fraud, be impeached, even by those to whom the husband is indebted at the time he makes it (b), but is binding and valid against all the world (c).

(a) 44 & 45 Vict. c. 41, s. 44 ; 1 Atk. 190 ; *Campion v. Cotton* (1810) 17 Ves. 272.

(b) *Spirett v. Willows* (1869) (But see Bankruptcy and Deeds of Arrangement Act, 1913, s. 13, *ante*, pp. 284–286.)

(c) *Brown v. Jones* (1744)

A post-nuptial settlement, on the other hand, is in general considered 'voluntary,' that is, for no valuable consideration; and, if it relate to lands or tenements, it used to be void, by the effect of the statute 27 Eliz. (1584) c. 4, as against subsequent purchasers of the same lands for valuable consideration, whether they purchased with notice of the settlement or not (*a*)—a mortgagee and a lessee being esteemed purchasers within the meaning of this Act (*b*). But now, by the Voluntary Conveyances Act, 1893 (*c*), a voluntary settlement of lands will not be impeachable by a subsequent purchaser, *merely* on the ground of its voluntary character; although it may still be impeached on proof of actual fraud.

A post-nuptial settlement, whether relating to real or personal property, still is, however, by the effect of the statute 13 Eliz. (1571) c. 5, void as against all creditors to whom the husband was indebted at the time of the settlement, without possessing adequate means of payment; and also as against his subsequent creditors, if he made it with the fraudulent view of defeating their future claims (*d*). And the provisions of the Bankruptcy Acts, 1883 and 1913 (*e*), render it, as we have seen, very precarious against creditors in a subsequent bankruptcy. There are instances, however, in which even a post-nuptial settlement is deemed to be not voluntary, but valid as against all the world; as in the case where it is executed either in pursuance of a written agreement to that effect entered into before the

(*a*) *Doe d. Otley v. Manning* (1807) 9 East, 59; *Doe d. Newman v. Rushum* (1852) 17 Q. B. 724.

(*b*) *Cracknall v. Janson* (1879) 11 Ch. D. 1; *In re Walkhampton Estate* (1884) 26 Ch. D. 391.

(*c*) 56 & 57 Vict. c. 21.

(*d*) *Stileman v. Ashdown* (1742) 2 Atk. 481; *Freeman v. Pope* (1870) L. R. 5 Ch. 538.

(*e*) See *ante*, pp. 283–286.

marriage (*a*), or as the condition of the husband's obtaining possession of the property to which the wife is equitably entitled (*b*), or in consideration of an additional portion, paid to him by her friends after the marriage (*c*).

2. SEPARATION DEEDS.—Although the law looks with the greatest disfavour on any agreement, the object of which is to relieve the parties from the duties of the conjugal relation; yet, where the husband and wife have actually come to a resolution to live apart, the Courts have repeatedly recognised the validity of agreements for their separation (*d*). In a separation deed, the husband usually covenants with trustees appointed on behalf of the wife, and also with the wife herself (*e*), that he will provide certain sums for the wife's separate maintenance; the wife herself covenanting with the husband to maintain herself. If there are children, provision is made for their custody, education, and maintenance. The deed also contains, in general, clauses by which both the husband and the wife covenant with the trustees, or with each other, not to molest or interfere the one with the other of them (*f*), and not to sue for the restitution of conjugal rights (*g*). Under such an agreement, the wife is entitled to receive her separate allowance, so long as the separation continues, and so

(*a*) *Doe v. Rowe* (1838) 4 Bing. N. C. 737; *Brown v. Jones* (1744) 1 Atk. 190. Even a post-nuptial settlement reciting a parol ante-nuptial agreement may be good (*In re Holland* [1902] 2 Ch. 360).

(*b*) *Wheeler v. Caryl* (1751) Amb. 121.

(*c*) *Russell v. Hammond* (1738) 1 Atk. 13.

(*d*) *Westmeath v. Salisbury*

(1831) 5 Bli. (N.S.) 339; *Westmeath v. Westmeath* (1830) 1 Dow. & Cl. 519; *Hamilton v. Hector* (1872) L. R. 13 Eq. 511; *Charlesworth v. Holt* (1873) L. R. 9 Exch. 38.

(*e*) *M'Gregor v. M'Gregor* (1888) 21 Q. B. D. 424.

(*f*) *Fearon v. Earl of Aylesford* (1884) 14 Q. B. D. 792.

(*g*) *Clark v. Clark* (1885) 10 P. D. 188; *Tress v. Tress* (1887) 12 P. D. 128.

long as she observes the covenants on her part in the deed contained; and, in the absence of an express stipulation therein, she will not forfeit her allowance, even by the commission of adultery (a).

It is to be observed, however, that, though the law allows provision to be made for a separation already determined on, yet it will not sanction any agreement, the effect of which is to provide for the contingency of a future separation at the pleasure of the parties; because this, it has been justly considered, has a tendency to promote that very event (b). A separation deed, so far as it is a separation deed and nothing more, is invariably avoided by a subsequent reconciliation (c); but this avoidance would not follow as regards particular terms in respect of which the deed was expressed, or was clearly intended, to have a continuing operation after the reconciliation (d). And the avoidance, even in the case of the ordinary separation deed, has no relation back (e). It must always be remembered, that a married woman, though thus voluntarily separated from her husband, is not thereby divested, as regards her position toward third parties or otherwise, of the condition of coverture (f).

III. *The mode of the dissolution of the relation of husband and wife.*—The relation of husband and wife may be actually dissolved either by death or by divorce.

(a) *Sweet v. Sweet* [1895] 1 Q. B. 12. A clause making the continuance of the allowance dependent upon the wife's good conduct is known as a 'dum casta clause.'

(b) *Hindley v. Marquis of Westmeath* (1827) 6 B. & C. 200; *Cartwright v. Cartwright* (1853) 3 D. M. & G. 982; *Cocksedge v. Cocksedge* (1844) 14 Sim. 244.

(c) *Nicol v. Nicol* (1886) 30

Ch. D. 143; 31 Ch. D. 524. (But see *Rowell v. Rowell* [1900] 1 Q. B. 9.)

(d) *Wilson v. Mushett* (1832) 3 B. & Ad. 743; *Negus v. Forster* (1882) 46 L. T. 675; *Nicol v. Nicol*, *ubi sup.*; *Spark v. Massey* [1904] 2 Ch. 121.

(e) *Crouch v. Waller* (1859) 4 De G. & Jo. 302.

(f) *Marshall v. Rutton* (1800) 8 T. R. 545.

Before the Matrimonial Causes Act, 1857 (a), there were two kinds of divorce obtainable by suit in the ecclesiastical courts: the one *à mensâ et thoro*, and the other *à vinculo matrimonii*. [Divorce *à mensâ et thoro*, or separation from bed and board, was pronounced in cases where, there having been no illegality in the union at its commencement, yet, from some supervenient cause it became improper for the parties to live together; as for the cause of intolerable cruelty in the husband, adultery in either of the parties, and in some few other cases mentioned in the books (b). But this species of divorce was never granted on the prayer of the husband on the ground of adultery, if the wife recriminated and proved that he also had been unfaithful to the marriage vow; or if it appeared that, after knowledge of her adultery, he had cohabited with her or otherwise condoned her offence (c). The sentence for this divorce, though it effected a judicial separation, did not bastardise the issue of the marriage, or enable either of the parties to contract a fresh union; but the wife, if the innocent party, generally became entitled to *alimony*, that is, an allowance for her support out of her husband's estate, to an amount settled at the discretion of the judge on a consideration of all the circumstances of the case, and usually proportioned to the rank, quality, and means of the parties. But no alimony was allowed to the wife if the divorce was on the ground of her adultery, or if she already had from other sources a sufficient income (d).

Divorce *à vinculo* was a declaration by the ecclesiastical court that the marriage was a nullity, as having been absolutely unlawful from the beginning; and it separated the parties *pro salute animarum*,

(a) 20 & 21 Vict. c. 85.

(b) *Evans v. Evans* (1790)

1 Hagg. Consist. 36.

(c) Oughton, *Ordo Judici-*

*orum*, I. 317; Burn, *Eccel. Law, Marriage*, xi.

(d) Cowell, *Interpreter*, tit. *Alimony*.

[bastardised the issue (*a*), and enabled the parties severally to contract another marriage at their pleasure (*b*). This particular species of divorce was never granted for any cause arising subsequently to the marriage; not even for adultery itself (*c*).] But though divorce *à vinculo* for adultery could not, prior to the Matrimonial Causes Act, 1857, be obtained in the regular course of law, either in the ecclesiastical or in the secular courts, yet it was very frequently granted by a private Act of Parliament; it having become the practice of the legislature to exercise its paramount authority in this manner, by way of extraordinary relief to a husband thus injured, but, *semble*, not to a wife.

By the Matrimonial Causes Act, 1857, however, and the subsequent statutes passed for its amendment or incidentally affecting its provisions, not only has the jurisdiction of the ecclesiastical courts in causes matrimonial been taken from them, and been transferred to the new court created by that Act (*d*), whence it has been transferred to the Probate, Divorce, and Admiralty Division of the High Court of Justice by the Judicature Act, 1873; but many novel provisions have been introduced into the law of divorce itself. The main effect of these provisions may be summarily stated as follows.

1. A *judicial separation*, in lieu of the divorce *à mensâ et thoro*, may now be decreed, on the petition of either husband or wife; and this decree has all the effect that belonged to the old divorce *à mensâ et thoro* (*e*). A judicial separation may be decreed on the ground of adultery, or cruelty, or on the ground of desertion

(*a*) Co. Litt. 235.

Salk. 138.

(*b*) *Stephens v. Totty* (1603) Moore, 665, 683; Cro. Eliz. 908.

(*d*) 20 & 21 Vict. c. 85, ss. 2, 6.

(*c*) Bac. Ab. *Marriage*, F.

(*e*) 20 & 21 Vict. c. 85,

s. 7.

3; *Foljambe's Case* (1703) 3

without cause for two years and upwards, on the part of either husband or wife (a) ; and, during the continuance of the decree, the wife acquires, as to property and for many other purposes, the condition of a *feme sole* (b).

2. A *divorce* or dissolution of the marriage, corresponding with the old divorce *à vinculo matrimonii*, may also now be obtained, on the petition of either husband or wife (c). When the husband is the petitioner, it may be on the ground that since the marriage the wife has been guilty of adultery ; but where she is the petitioner, it may only be on the ground that he has since the marriage been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of unnatural crime, or of adultery coupled with such cruelty as would, without adultery, have formerly entitled her to a divorce *à mensâ et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards (d). But no divorce can be decreed, if the petitioner, whether husband or

(a) 20 & 21 Vict. c. 85, s. 16. A decree will generally be refused to a petitioner who has been guilty of a matrimonial offence, other than desertion (*Otway v. Otway* (1888) 13 P. D. 141 ; *Duplany v. Duplany* [1892] P. 53 ; *Synge v. Synge* [1900] P. 180) ; or who has been guilty of desertion conducing to the respondent's adultery (*Hodgson v. Hodgson* [1905] P. 233). By the Summary Jurisdiction (Married Women) Act, 1895 (s. 4), a wife is entitled to obtain in a summary way an order having the effect of a judicial separation ;

if her husband has been guilty of one or more specified kinds of cruelty or neglect towards her. And by the Licensing Act, 1902 (s. 5), husband or wife may obtain a similar remedy in case of the habitual drunkenness of the other.

(b) Act of 1857, ss. 25, 26.

(c) A private Act may still be necessary under special circumstances ; as where the parties are domiciled in Ireland. (See *Joynt's Divorce Bill* (1888) L. R. 13 App. Ca. 741 ; *Whitaker's Divorce Act*, 1894 ; *Malone's Divorce Bill* [1905] A. C. 314.)

(d) Act of 1857, s. 27.

wife, has been accessory to, or has connived at, or has condoned, the adultery; or if the petition is presented or prosecuted by collusion (*a*). And the Court is not bound to decree the divorce, if the petitioner has been guilty of adultery during the marriage, or of cruelty, or of desertion or wilful separation, or of such wilful neglect or misconduct as has conduced to the respondent's adultery; or if there has been unreasonable delay in presenting the petition, or if the petitioner has failed to place material facts before the Court (*b*).

3. Every decree for a divorce is, in the first instance, a decree *nisi*, to be made absolute after the expiration of such a period, not less than six months, as by general or special order is from time to time directed (*c*). At the expiration of that time, the petitioner, but not the respondent, may apply to have the decree *nisi* made absolute (*d*). During this interval, any person may show cause why the decree should not be made absolute; either by reason of collusion or of some material facts not brought forward at the hearing of the original petition. And, on cause being so shown, the case is dealt with, either by making the decree *nisi* absolute, or by reversing that decree, or by ordering further inquiry, or otherwise ordering as justice may require (*e*). The King's Proctor is the official specially charged with intervention, in cases in which the process of the Court is being used for improper purposes.

4. On a decree for dissolution of marriage, the appeal is first to the Court of Appeal; and thereafter there may, in certain cases, be an appeal to the House

(*a*) Act of 1857, s. 30.

(*b*) *Ibid.* s. 31; *Constantinidi v. Constantinidi* [1903] P. 246; *Wyke v. Wyke* [1904] P. 149; *Evans v. Evans* [1906] P. 125.

(*c*) Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), s. 3.

(*d*) *Ousey v. Ousey* (1875) 1 P. D. 56.

(*e*) Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7. (See *Roche v. Roche* [1905] P. 142; *Burdon v. Burdon* [1901] P. 52.)



of Lords, within one calendar month if the House of Lords is then sitting, and otherwise within one fortnight after the House next sits (*a*).

5. When a marriage is dissolved, it is lawful for either party to marry again, as if the prior marriage had been dissolved by death (*b*). But the marriage is regarded as dissolved only as from the date of the decree absolute (*c*).

6. On a decree for judicial separation on the wife's petition, or on a decree for dissolution of the marriage, an order may be made assigning alimony to the wife, even in cases where she has been guilty of adultery (*d*), and providing for the custody, maintenance, and education of the children (*e*). And on a decree for divorce, or judicial separation on the ground of adultery of a wife entitled to any property, an order may be made providing for a portion of such property being settled upon the innocent party and the children of the marriage (*f*).

7. After a final decree for the dissolution of a marriage, a supplementary inquiry may also take place into the existence of any ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree; and, on such inquiry, such orders may be made as shall seem fit, with reference to the application of the whole or a portion of the property settled, for the benefit either of the children

(*a*) Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 9, modifying the Divorce Amendment Act, 1868 (31 & 32 Vict. c. 77), s. 3; *Cleaver v. Cleaver* (1884) L. R. 9 App. Ca. 631; *Butchart v. Butchart* [1901] A. C. 276.

(*b*) Act of 1857, s. 57.

(*c*) *Hulse v. Hulse* (1871) L. R. 2 P. & M. 259; *Norman v. Villars* (1877) 2 Ex. D. 359.

(See, however, *Prole v. Soady* (1868) L. R. 3 Ch. App. 220.)

(*d*) Act of 1857, s. 17; Act of 1907, s. 1; *Ashcroft v. Ashcroft* [1902] P. 272.

(*e*) Act of 1859 (22 & 23 Vict. c. 61), s. 4.

(*f*) Act of 1857, s. 45; Act of 1860, s. 6. (See *Gladstone v. Gladstone* (1875) 1 P. D. 442.)

of the marriage, or of the parties whose marriage is dissolved (a) The Court may exercise this power, even though there are no children of the marriage (b).

8. A decree of *nullity of marriage* may also be obtained on any ground which would formerly have justified a divorce *à vinculo* ; but every such decree is also a decree *nisi* in the first instance (c). The like orders touching alimony or the settled property of the parties, and the maintenance and custody of the children, if any, may, in the case of this decree, be made as in the case of a decree for divorce (d).

9. Where the King's Proctor, or any other person, intervenes or shows cause against the rule *nisi* for a divorce or for a judgment of nullity, such order may be made as to the costs thereby occasioned as shall seem just (e).

(a) Act of 1859, s. 5 ; *Thomson v. Thomson* [1896] P. 263 ; *Allcard v. Walker* [1896] 2 Ch. 369 ; *Hodgson Roberts v. Hodgson Roberts* [1906] P. 142.

(b) Act of 1878 (41 & 42 Vict. c. 19), s. 3.

(c) Act of 1857, ss. 6, 10, 22, 35, 41 ; Act of 1860, s. 7 ;

Act of 1873.

(d) Act of 1857, s. 35 ; Act of 1859, ss. 4, 5 ; Act of 1878, s. 3 ; *A. v. M.* (1885) 10 P. D. 178 ; *Langworthy v. Langworthy* (1886) 11 P. D. 85 ; *Dormer v. Ward* [1901] P. 20.

(e) Act of 1878, s. 2.

## CHAPTER III.

## OF PARENT AND CHILD.

THE relation of parent and child leads us to consider : first, the law of legitimacy, second, the reciprocal duties and rights between parents and their legitimate offspring, and third, the rights and incapacities of illegitimate children, otherwise called 'bastards' (a).

I. A legitimate child is commonly described as a child born in wedlock ; but, more accurately, he is a child between whose parents the relation of marriage subsisted either at the time when he was begotten, or at the time when he was born, or at some intervening period (b). For a child begotten of parents married at that time, or married afterwards, but before he was born, is legitimate ; though in consequence of the death of one of them, or of their divorce, the marriage may have been dissolved before he was born. And the case is the same with a child born of parents married at the time of his birth, though they were unmarried when he was begotten. But our law makes it an indispensable condition, that the parents should in every case intermarry at some period before the child's birth (c) ; differing in this respect from the civil and

(a) Co. Litt. by Butler, *Gardner v. Gardner* (1877) 243 b, n. (2). L. R. 2 App. Ca. 723.

(b) Co. Litt. 7 b, 244 a ; (c) *Doe d. Birtwhistle v. Vardill*, *ubi sup.*  
(1840) 6 Bing N. C. 385 ;

canon laws, according to which it was sufficient, if the parents should intermarry even after the birth (a).

What has been hitherto said supposes, it will be observed, the true parentage in each case to be established ; but that is a point which, even as regards the ostensible issue of married persons, the law permits, although with reluctance and under severe restrictions, to be brought into controversy. For if the husband alone be out of the kingdom of England, or, as the law somewhat loosely phrases it, *extra quatuor maria*, for above nine months, so that no access to his wife can be presumed, her issue begotten during that period shall be bastards (b) ; and, contrary to what was at one time supposed to be the law (c), children born during marriage may also now be proved bastards by other evidence, *e.g.*, by proof of the impotence of the husband, or by proof that the husband and wife had no opportunity, though both within the realm, of sexual intercourse within such period as is consistent with their being the parents (d), or even by proof of circumstances tending strongly to the inference that no such intercourse in fact took place (e). But, except where evidence is given of facts sufficient to disprove sexual intercourse, the law always presumes in favour of the legitimacy of a child born to the wife during the marriage (f). Upon the same principle, legitimacy will always be presumed, subject to the same excep-

(a) Co. Litt. by Butler, 245 a, n. (1).

(b) Co. Litt. 244.

(c) *Ibid.*

(d) *Hawes v. Draeger* (1883) 23 Ch. D. 173 ; *Glenister v. Harding* (1885) 29 Ch. D. 985 ; *Bosville v. A.-G.* (1887) 12 P. D. 177.

(e) *R. v. Lubbenham* (1791) 4 T. R. 251 ; *Banbury Peerage*

*Case* (1811) 1 S. & S. 153 ; *Morris v. Davies* (1836) 5 Cl. & F. 163 ; *Poulett Peerage Case* [1903] A. C. 395.

(f) *R. v. Mansfield* (1841) 1 Q. B. 449 ; *Hargrave v. Hargrave* (1846) 9 Beav. 552 ; *Saye and Sele Peerage* (1848) 1 H. L. C. 507 ; *Gordon v. Gordon* [1903] P. 141.

tion, with respect to children born after the coverture has ceased by reason of the husband's death ; unless the birth takes place so long afterwards that the child clearly could not be begotten by him. What shall be considered as the *ultimum tempus pariendi*, i.e., the extreme period between the conception and the birth, is a matter of fact which the law leaves to be determined, according to the circumstances of the particular case, and the testimony which persons of experience may give of the course of nature on this subject. But in general, nine calendar months, or forty weeks, has been considered the extreme limit (a).

[Where a widow is suspected to feign herself with child, in order to produce a supposititious heir, the heir presumptive, or other person who would in default of issue of the widow's late husband be entitled to real estate, may have a writ *de ventre inspiciendo*, to examine whether the widow be with child or not, and, if she be, to keep her under proper restraint till delivered (b). But if the widow, upon due examination, be declared not pregnant, the presumptive heir shall be admitted to the inheritance ; though liable to lose it again on the birth of a child within the forty weeks from the death of the husband (c).

If a man dies, and his widow soon after marries again, and a child is born within such a time as that by the course of nature he might have been the child of either husband, in this case he is said to be more than ordinarily legitimate ; for, when he arrives to years of discretion, he may choose which of the fathers

(a) Co. Litt. by Harg. 123 b, n. (1); *Alsop v. Bowtrell* (1620) Cro. Jac. 541; *Bosvile v. A.-G.*, *ubi sup.*; *Burnaby v. Baillie* (1889) 42 Ch. D. 282.

(b) Bract. l. 2, cap. 32; *Aiscough's Case* (1731) 2

P. Wms. 591; *Ex parte Wallop* (1792) 4 Bro. C. C. 90; *Re Blakemore* (1845) 14 L. J. Ch. 336; Co. Litt. by Harg. 8 b, and n. (3); *ibid.* 123 b, n. (1).

(c) Britton, ch. lxvi.

[he pleases (a). To prevent this inconvenience, the civil law ordained that no widow should marry *intra annum luctus* (b)—a rule which obtained so early as the reign of Augustus, if not of Romulus (c). And the same constitution was probably handed down to our early ancestors from the Romans during their stay in this island ; for we find it established under the Saxon and Danish governments (d).] But although the hasty remarriages of widows are indecent, and, in some instances, have been revolting, there is nothing in our law which prohibits them.

II. [We are next to consider the duties of parents towards, and their powers over, their legitimate children ; and the reciprocal duties of such children towards their parents.

1. And first, *the duties of the parents*.—These duties principally consist in three particulars ; namely, the maintenance of the children, their protection, and their education. For the duty of parents to provide for the maintenance of their children is a principle of natural law. And, as Montesquieu very justly observes (e), the establishment of marriage in all civilised states is built on this natural obligation of the father to provide for his children ; and the municipal laws of all well-regulated states have taken care therefore to enforce this duty. The Roman civil law, in particular, obliged the parent to provide maintenance for his child (f) ; and it carried this matter so far, that it would not suffer a parent at his death totally to disinherit his child, without expressly giving his reason for so

(a) Co. Litt. 8 a. (But see n. (7), by Harg.)

(b) Cod. 5, 9, 2.

(c) Ov. *Fast.* l. 33–36.

(d) *Sit omnis vidua sine marito duodecim menses.*—

Wilk. *Leg. Anglo-Sax.* Ll. Ethel. A.D. 1008 ; Ll. Canut. ch. lxxi.

(e) *Esprit des Lois*, bk. xxiii. ch. ii.

(f) Dig. 25, 3, 5.

[doing (a). And if the parent alleged no reason, or a bad one, or a false one, the child might set the will aside *tanquam testamentum inofficiosum*—a testament contrary to the natural duty of the parent (b)—a law which Grotius and others have considered as going too far (c).] But certainly our own common law may be said to have gone not far enough; for the obligation at common law of a father to provide for the maintenance of his children is one which the common law supplies no direct means of enforcing (d). For the mere moral obligation upon a father to maintain his child affords no inference of a promise to do so, or to pay for necessities supplied for the use of the child (e). Possibly, however, a father may be liable to repay another for the support of his child, when he has deserted it and left it in a destitute state (f).

The deficiencies of the common law in this respect have been in some measure supplied by statute; the Acts relating to the relief of the poor making it compulsory upon all, whose circumstances enable them to do so, to provide a maintenance for their progeny, when in poverty, of whatever age they may be, and indeed whenever, through infancy, disease, or accident, they are unable to support themselves. The manner in which this obligation is to be performed is thus pointed out by the legislature (g). The father and

(a) Nov. 115, 3.

(b) Inst. ii. 18; Puff. L. 4, ch. xi. s. 7.

(c) *De Jure Belli ac Pacis*, l. 2, cap. 7, n. 3.

(d) *Cooper v. Martin* (1803) 4 East, 84; *Mortimore v. Wright* (1840) 6 M. & W. 482.

(e) *Mortimore v. Wright, ubi sup.*; overruling *Law v. Wilkin* (1837) 6 A. & E. 718.

(f) *Urmston v. Newcomen* (1836) 4 A. & E. 899.

(g) See especially the Poor Relief Act, 1601 (43 Eliz. c. 2), s. 6; Poor Relief Act, 1718 (5 Geo. 1, c. 8); Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 26; Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 3; Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), ss. 56, 57; Poor Law Amendment Act, 1848 (11 & 12 Vict. c. 110), s. 8; Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122),

mother, grandfather and grandmother, of any poor person not able to work, are to maintain him or her at their own charges, if of sufficient ability ; according as the justices in petty sessions shall direct. The orders of the justices may be enforced in the manner prescribed by the Summary Jurisdiction Act, 1848 (*a*). If a parent runs away and leaves his children chargeable to the parish, the churchwardens and overseers, upon obtaining an order of the magistrates for the purpose, may seize his rents, goods, and chattels, and dispose of them towards the required relief (*b*).

Every man is liable to maintain the children, whether legitimate or illegitimate, of his wife born before his marriage with her, as part of his own family, and is chargeable with all poor law relief granted to them, until they attain the age of sixteen, or until the death of the mother (*c*) ; and he may be compelled, if separated from her under the Summary Jurisdiction Act, 1895, to make her an allowance for their support (*d*).

By the Married Women's Property Act, 1882 (*e*), a married woman having separate property is made subject to the same liability for the maintenance of her children and grandchildren, as the husband is subject to for the maintenance of her children and grandchildren ; and she can now be made liable to maintain her parents, if she has separate estate, and is of sufficient ability to do so (*f*). But a married woman having separate property is not, under the Married Women's Property Acts, liable to maintain the children of her husband by a former marriage ; though he is liable to maintain her children by a former marriage.

ss. 33, 41 ; Children Act, 1908, Act, 1834, s. 57.

ss. 22, 125.

(*d*) *Hill v. Hill* [1902] P.

(*a*) 11 & 12 Vict. c. 43. (See 140.

Poor Law Amendment Act, 1867, s. 36.)

(*e*) 45 & 46 Vict. c. 75, s. 21.

(*b*) Poor Relief Act, 1718 (5 Geo. 1, c. 8).

(*f*) Married Women's Property Act, 1908, s. 1 ; overruling *Pontypool Guardians v. Buck* [1906] 2 K. B. 896.

(*c*) Poor Law Amendment



A parent who, although able to do so, neglects or refuses to maintain his family, which thereby becomes chargeable to the parish, may be punished under the Vagrancy Act, 1824 (*a*).

By the provisions of the Children Act, 1908, any person over the age of sixteen years who, having the custody of any child or young person under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person in a manner likely to cause it unnecessary suffering, or injury to its health, is guilty of a misdemeanor, and is punishable on indictment by a maximum fine of 100*l.*, and a maximum imprisonment (with or without hard labour) for two years, and on summary conviction by a maximum fine of 25*l.*, and a maximum imprisonment for six months (*b*). And, in particular, no parent or other person having the custody of a child or young person may cause or allow it to be sent out of the United Kingdom for the purpose of performing in public for profit, except with a magistrate's licence, upon pain of heavy punishment (*c*).

By the Children Act, 1908 (*d*), which repeals the Reformatory Schools Act, 1866, and the Industrial Schools Act, 1866, in any case in which a child is detained in a certified school, the parent or step-parent, or other person liable for his maintenance, if of sufficient ability, is made liable to contribute to his support, maintenance, and training therein, to an extent not exceeding the average cost of maintenance of children in such a school as declared by Order in Council.

By the Education (Provision of Meals) Act, 1906 (*e*), a local authority is empowered to take such steps as it shall think fit for the provision of meals for children in

(*a*) 5 Geo. 4, c. 83, s. 3.

(*b*) Children Act, 1908, s. 12.

(*c*) Children (Employment

Abroad) Act, 1913.

(*d*) S. 75.

(*e*) 6 Edw. 7, c. 57.

attendance at any public elementary school within its area ; and is directed to require and recover payment from parents in respect of meals so supplied.

[No person, however, is bound to provide a maintenance for his issue, unless where they are, either through infancy, disease, or accident, impotent and unable to work ; and then he is only obliged to find them in necessaries. For our laws do not compel a father to maintain his children who are able to maintain themselves ; and it is unjust to oblige the parent, against his will, to provide his children with superfluities. Moreover, our laws have made no provision to prevent the disinheriting of children by will, but leave every man's property at his own disposal ; though among persons of any rank or fortune, a competence is generally provided by the marriage settlement for younger children, while the bulk of the estate is settled upon the eldest son.

Next to the duty of maintenance is the duty of protection ; and a parent may maintain and uphold his children in their lawsuits, without being guilty of the offence of maintaining quarrels (*a*). He may also justify an assault and battery, in defence of their persons (*b*).

The third duty of parents to their children is to give them an education suitable to their station in life.] Although provision for the education of children has from the earliest times been made by our churches and chapels, and by the munificence of wealthy individuals and corporations ; yet by reason of the vast increase of the population, the supply, at least of elementary schools, has never equalled the demand. The matter received special attention in the year 1870, when, by the Elementary

(*a*) 2 Inst. 564 ; *Bradlaugh* D. 1.  
*v. Newdegate* (1883) 11 Q. B. (*b*) 1 Hawk. P. C. 131.

Education Act, 1870 (*a*), very extensive further provision was made for the education of the poorer classes of children ; and the school boards constituted by that Act obtained power to make by-laws requiring parents to cause their children to attend school. The duty of procuring efficient elementary instruction for their children was first imposed on parents generally by the Elementary Education Act, 1876 (*b*). Of these statutes, and of those by which they have been amended, we shall give a more particular account hereafter (*c*).

2. Second, *the powers of parents*.—[The power of parents over their children is derived from their duty towards them ; and the municipal laws of some nations have given a much larger authority to parents than we find in others. Thus, the antient Roman law gave the father a power of life and death over his children (*d*) ; and, though the rigour of that law was softened by subsequent enactments (*e*), parents maintained to the last, under the Roman law, a very large and absolute authority. For, with certain exceptions, a son could not acquire any property of his own during the life of his father ; all his acquisitions belonging to the father, or at least the profits of them for his life (*f*). And although, under our law, the power of parents is much more moderate, still it is sufficient to keep children in order. And a father may lawfully correct his child, being under age, in a reasonable manner ; for that is for his benefit (*g*). The father may also delegate part of his parental authority to a tutor or schoolmaster ; and the schoolmaster is then *in loco parentis*, and has such power of correction, as may be necessary to answer the purposes for which he is employed.

(*a*) 33 & 34 Vict. c. 75.      47, 10.

(*b*) 39 & 40 Vict. c. 79, s. 4.      (*e*) Dig. 48, 9, 5.

(*c*) *Post*, bk. iv. pt. iii. ch.      (*f*) Inst. ii. 9, 1.

iii. vol. iii. pp. 53–75.      (*g*) 1 Hawk. P. C. 130.

(*d*) Dig. 28, 2, 11 ; Cod. 8,

[A father is also, generally speaking, guardian of the property of his infant child ; and, if such child has any real estate, the father is entitled to take charge of it, and to receive the rents and profits thereof during the minority, subject to a liability to account for them on the child's attaining full age.] But a father has no such right in respect of his child's personal estate. He cannot, therefore, give a good discharge for a legacy due to the latter (*a*), except under an order of the Court, or by the direction of the testator.

The father is also entitled, as the general rule, to the possession and custody of the person of his child ; and it is only in very extreme cases that he will be deprived of that custody (*b*). And in general, if the possession or custody be withheld from him, he may regain it by writ of *habeas corpus*, or by an application to the Chancery Division of the High Court of Justice (*c*) ; but the Court may now, in its discretion, refuse, but only on just grounds, to grant a writ or to make an order for the production of the child (*d*). The right of the father, mother, or other guardian, to the possession of their children, is also, to a certain extent, protected by the provisions of the criminal law ; under which it is made highly penal, either by force or by fraud, to take or entice away, or to detain, any child under the age of fourteen, with intent to deprive its parent, guardian, or other person having lawful charge of such child, of the possession thereof ; or with such intent, to receive or harbour it, knowing the child to have been so taken or detained ; or unlawfully to take, or

- (*a*) *Dagley v. Tolferry* (1715) 1 P. Wms. 285. 1886, s. 5 (*post*, p. 446).  
 (*b*) *Wellesley v. Beaufort* (1827) 2 Russ. 21 ; *Re Agar Ellis* (1883) 24 Ch. D. 317 ; *Skinner v. Skinner* (1888) 13 P. D. 90. But see now Guardianship of Infants Act, (c) *Earl of Westmeath's Case* (1822) Jacob, 251 ; *Ex parte Witte* (1853) 13 C. B. 680 ; *Re Newton* [1896] 1 Ch. 740.  
 (*d*) Custody of Children Act, 1891, s. 1.

cause to be taken, any unmarried girl, under the age of sixteen, out of the possession and against the will of her father or mother, or other person having lawful care or charge of her (*a*). Moreover, the assent of the father to the marriage of his child, if under age, and not being a widower or widow, is also requisite under the Marriage Acts, 1823 and 1836 ; as was explained at large in the previous chapter (*b*).

[The legal power of a father over the persons or property of his children extends not in any case beyond the age of twenty-one ; for they are then enfranchised by arriving at years of discretion. But until that age arrives, this empire of the father continues even after the father's death ; for he may by deed or will appoint a guardian to such of his *unmarried* children as are infants (*c*).]

With respect to the mother, she had not at common law, as against the father, any legal power over the child in the father's lifetime (*d*). But now, under the Guardianship of Infants Act, 1886 (*e*), the Court may, on the application of the mother, make such order as it may think fit regarding the custody of her infant child, and the access thereto of either parent ; having regard to the welfare of the infant, and to the conduct and the wishes of either parent. And upon such application the Court may override entirely the common law rights of the father (*f*). Moreover, the Custody of Infants Act, 1873 (*g*), permits agreements in separation deeds providing that the father of an infant shall give up the custody or control thereof to the mother ; although the Act also provides that

(*a*) *Post*, bk. vi. ch. iv. vol. 1 Ch. 786.  
iv. pp. 80–81.

(*b*) See *ante*, pp. 391–392.

(*c*) 12 Car. 2 (1660) c. 24.

(*d*) *Re Agar Ellis* (1883) 24  
Ch. D. 317 ; *Re A. & B.* [1897]

(*e*) 49 & 50 Vict. c. 27, s. 5.

(*f*) *Re A. & B.* [1897] 1 Ch.

786.

(*g*) S. 2.

no Court shall enforce any such agreement if it is of opinion that it will not be for the infant's benefit.

After the father's death, the mother was always considered to be entitled to the custody of her children until twenty-one, subject, however, to the power of the guardians, if any, appointed by the father's will (a) ; and by the Marriage Acts, 1823 and 1836 (b), where there was no other guardian appointed, the widow, while she remained unmarried, stood in the father's place, after his death, as to the consent required for the child's marriage during minority. She could not, however, appoint a guardian by will, as she was not mentioned in the statute of Charles the Second, by virtue of which alone the father enjoyed that privilege (c) ; though, if she purported to appoint such a guardian, the Court would have regard to her wishes (d). But it has now been provided by the Guardianship of Infants Act, 1886 (e), that the mother may by deed or will appoint a guardian after her own death and the death of the father of the children, to act jointly with the guardian (if any) appointed by the father (f) ; and by the same enactment she may provisionally appoint a person or persons to act after her death with the father, if the Court should consider the father not a fit person to have sole custody of the child (g).

By the same Act, the mother, if she survive the father, is constituted the guardian of her infant children generally, to act jointly with the guardian (if any) appointed by the father ; although, if no guardian has been appointed by the father, or the guardians appointed by the father are dead or refuse to act, the Court

(a) *Talbot v. Earl of Shrewsbury* (1839) 4 My. & Cr. 672.

3 Atk. 519.  
(d) *In re Kaye* (1866) L. R. 1 Ch. App. 387.

(b) 4 Geo. 4, c. 76, s. 8 ; 6 & 7 Will. 4, c. 85, ss. 8, 14-17.

(e) 49 & 50 Vict. c. 27, s. 3.

(f) *Ibid.* s. 2.

(c) *Ex parte Edwards* (1747)

(g) *Ibid.* s. 3 (2).

may associate one or more guardians with her (a). Finally, by the same Act (b), a parent may be declared by the Court which has pronounced a decree for judicial separation or divorce by reason of his or her misconduct, to be unfit to have the custody of the children of the marriage ; and in such case the parent so declared unfit will not, upon the death of the other parent, be entitled as of right to the custody or control of such children. It is now well settled, that the mother is the natural guardian of her illegitimate child ; though her rights are not identical with those of the father of a legitimate child (c).

3. [Third, *the duties of children to their parents*.—These are duties which arise from natural justice. For to those who gave us existence, we naturally owe subjection, honour, and reverence ; they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their old age ; and they, who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by their offspring. In this country, however, the law has not deemed it necessary to make much provision on the subject of the filial obligations ; it is, nevertheless, a provision of our law, that a child is justified in defending the person and maintaining the cause or suit of his parent, just as we have seen that a parent is justified in performing the same duties for his child.] And by the Acts relating to the relief of the poor, the children of any old, blind, lame, impotent, or other poor person not able to work, if of sufficient ability, are required, at their own charges, to relieve and maintain him or her, in the manner and according to the rate which the justices of the peace at their

(a) 49 & 50 Vict. c. 27, s. 2.  
And see *Re Scanlan* (1888) 40  
Ch. D. 200.

(b) S. 7.

(c) *R. v. Nash* (1883) 10 Q. B.  
D. 454 ; *Barnardo v. McHugh*  
[1891] A. C. 388 ; *Humphrys*  
*v. Polak* [1901] 2 K. B. 385.

petty sessions shall direct (*a*). And, as already mentioned, a married woman, having separate property, is under similar liability towards her parents (*b*).

III. We are next to consider the case of illegitimate children or bastards. By our law, the duty of parents with regard to these is principally that of maintenance. And the method in which the English law provides maintenance for an illegitimate child, during its infancy, is as follows. The mother is entitled to the custody of the child (as it would seem) in preference to the putative father (*c*), and is bound to maintain it until the child attains the age of sixteen, or, being a female, marries (*d*). In the event of the mother's marriage, the same liability attaches to her husband, but ceases with her death (*e*). If the mother, being of sufficient ability to maintain her bastard, neglects that duty, so that it becomes chargeable to the parish, she is made liable, by the Poor Law Amendment Act, 1844 (*f*), to be punished as an idle and disorderly person under the Vagrancy Act, 1824 (*g*). If, on the other hand, she be not of sufficient ability, the law affords her the means of compelling the putative father to supply a fund for its maintenance. For, by the Bastardy Laws Amendment Acts, 1872 and 1873 (*h*), a single woman may, either before the birth of her bastard child, or at any time within twelve months afterwards, make application to a justice of the peace, charging a person by

(*a*) Poor Relief Act, 1601, s. 6; Poor Law Amendment Act, 1867.

(*b*) See *ante*, p. 441; Married Women's Property Act, 1908, s. 1; overruling *Pontypool Guardians v. Buck* [1906] 2 K. B. 896.

(*c*) *Ex parte Ann Knee* (1804) 1 B. & P. (N.S.) 148; *R. v. Nash* (1883) 10 Q. B. D. 454.

(*d*) Poor Law Amendment Act, 1834, s. 71.

(*e*) *Ibid.* s. 57.

(*f*) 7 & 8 Vict. c. 101, s. 6.

(*g*) 5 Geo. 4, c. 83.

(*h*) 35 & 36 Vict. c. 65; 36 & 37 Vict. c. 9. Similar provisions were contained in ss. 2, 3 (now repealed), of the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101).



name as the father of such child ; and where the alleged father has within twelve months next after its birth paid money for the maintenance of the child, such application may be made at any subsequent period whatever, without limitation in regard to time. Upon such application, the justice issues his summons to the party charged to appear at a petty sessions (a). On the return of the summons, the evidence on both sides is heard ; and if the evidence of the mother as to the paternity of the child be corroborated in some material particular (b) by other testimony, to the satisfaction of the justices in petty sessions, the man charged may be adjudged to be the ' putative father ' of the child in question. And in that case the justices or magistrate may, if they or he see fit under the circumstances, make an order on him, called a ' bastardy,' ' affiliation,' or ' maintenance ' order, for the payment to the mother, or to some other person to be appointed for the custody of the child in the case of her death, insanity, or imprisonment, of a weekly sum of money for its maintenance and education. Such an order remains in force until the child dies or attains the age of thirteen, or occasionally the age of sixteen (c) ; and, unless the justices otherwise order, continues enforceable after the mother's marriage (d). The father's liability under the order (as we have seen in a former chapter) is not released by any order of discharge in bankruptcy (e). The father is, however, entitled to appeal to quarter

(a) In London a single police magistrate has the same powers as the justices at petty sessions (*Bastardy Act*, 1845 (8 & 9 Vict. c. 10), s. 9).

(b) As to what amounts to corroboration, see *Cole v. Manning* (1877) 2 Q. B. D. 611.

(c) *Bastardy Laws Amendment Act*, 1872, s. 5 ; *Pearson v. Heys* (1881) 7 Q. B. D. 260.

(d) *Sotherton v. Scott* (1881) 6 Q. B. D. 518 ; *Williams v. Davies* (1883) 11 Q. B. D. 74.

(e) *Bankruptcy Act*, 1890 (53 & 54 Vict. c. 71), s. 10.

sessions from the order, upon entering into his recognisance to try the appeal and to pay such costs as shall be adjudged thereon, and upon otherwise complying with the prescribed conditions and regulations (a); and, on the hearing of such appeal, the case is to be tried *de novo*.

Bastards, although their maintenance during childhood is thus provided for, labour under many disadvantages. For a bastard is, for legal purposes, *filius nullius* or *filius populi* (b); and hence is not entitled by law either to the name of his mother or to that of his father (c), although he may (if he choose) assume the surname of either, or in fact any other surname (d). A bastard cannot take property by the mere description of 'child' of his putative parent; until he has in some way acquired the reputation of standing in that relation to him. In a will, the term 'children' *primâ facie* means legitimate children; and an illegitimate child will not be permitted to take under a limitation to 'children.' But this rule is departed from where, from the circumstances or from the true construction of the will, it appears that the testator must have intended illegitimate children to take (e).

With regard to the acquisition of property by inheritance, or under the Statute of Distribution, a bastard is also in a different position from others; for he can neither himself be heir or next of kin to any one, nor have any heir or next of kin except

(a) Poor Law Amendment Act, 1844, s. 4; Summary Jurisdiction Acts, 1879 and 1884 (42 & 43 Vict. c. 49, ss. 31, 32; 47 & 48 Vict. c. 43); *R. v. Skingler* (1886) 17 Q. B. D. 49.

(b) Fortesc. *De Leg.* ch. 4.

(c) Co. Litt. 3 b; *Wilkinson v. Adam* (1812) 1 Ves. &

B. 452.

(d) Falconer, *Surnames*, 1862, and Supplement, 1863; *Doe d. Luscomb v. Yates* (1822) 5 B. & Ald. 544.

(e) *Hill v. Crook* (1873) L. R. 6 H. L. 265; *Re Walker* [1897] 2 Ch. 238; *Re Loveland* [1906] 1 Ch. 542; *Re Eve* [1909] 1 Ch. 796.

the issue of his own body. If, therefore, a bastard purchase land, though he may take in fee, yet, so far as the power of disposing of the same to others is concerned, it is not, while it remains in his own seisin, a fee in the sense of being descendible to heirs generally ; but its descent is confined to the heirs of his own body (a). If he die seised of such estate without having devised it, and without leaving any such heirs, it will escheat to the Crown or other lord of the fee ; and the Crown or lord respectively has, under the Intestates' Estates Act, 1884, a similar right to the undisposed-of proceeds of sale of real estate directed by will to be sold (b). The Crown is entitled also to the beneficial administration of the personal estate of a bastard who dies intestate and without any issue or widow surviving him. The claim of the Crown to the real or personal estate of a bastard is not, however, strictly enforced ; for the Crown's right will in general, upon the due petition in that behalf, be transferred to the nearest member of the bastard's reputed family (c).

There are some other points also, as to which a bastard is peculiarly circumstanced. Thus, he does not follow, as legitimate children do, his father's place of parochial settlement under the laws relating to the poor ; but his primary settlement, if he was born before the 14th August, 1834, is in the parish where he was born (d). If born after that date, he takes the settlement of his mother till he attains the age of sixteen ; and retains the settlement so taken until he acquires another (e). On the other hand, to authorise his

(a) *Idle v. Cooke* (1705) *Ld. Raym.* 1152 ; 1 *Prest. Est.* 468.      c. 94) ; Intestates' Estates Act, 1884.

(d) *Hard's Case* (1697) *Salk.* 427.

(b) *A.-G. v. Anderson* [1896] 2 *Ch.* 596.      (e) Poor Law Amendment

(c) *Toller, Ex.* 107 ; Crown Lands Act, 1819 (59 *Geo.* 3,      Act, 1834, s. 71 ; Divided Parishes and Poor Law

marriage under twenty-one, the consent of his father or mother is not required (a) ; but a licence to marry may be granted to him, upon oath made that there is no person authorised to give such consent (b). And though a father may in general by deed or will appoint a guardian for his infant child, he has no such privilege if the child be illegitimate.

On the other hand, the laws relative to incest, and to marriages within the prohibited degrees of consanguinity or affinity, apply to a bastard with equal force as to those who are born in wedlock ; the principle of his being *nullius filius* having no effect in these particulars (c). And it may be stated generally, that, except in the several points above enumerated, the legal position of a bastard is the same with that of another man. And he is capable of being, by the transcendent power of Parliament, made legitimate for all purposes, even that of inheriting land ; as was done by a statute of Richard the Second in the case of John of Gaunt's children (d). Finally, as already mentioned in a previous chapter, illegitimate relationship is fully recognised by the Workmen's Compensation Act, 1906 ; for under that Act an illegitimate child may be entitled to compensation as a 'dependant' of its parent, or a parent as a 'dependant' of his illegitimate child (e).

Amendment Act, 1876, ss. 34, 35 ; *West Ham Union v. Holbeach Union* [1905] A. C. 450 ; *Woolwich Union v. Fulham Union* [1906] 2 K. B. 240.

(a) *Priestley v. Hughes* (1809) 11 East, 1.

(b) Marriage Act, 1823, s. 14 ; Marriage Act, 1836, s. 12.

(c) *Hains v. Jessell* (1696) 1 Ld. Raym. 68 ; *R. v. Chafin* (1702) 3 Salk. 66 ; *The Queen v. Brighton* (1861) 1 B. & S. 447, 453.

(d) 4 Inst. 36.

(e) 6 Edw. 7, c. 58, s. 13. (See *ante*, p. 371.)

## CHAPTER IV.

## OF GUARDIAN AND WARD.

THE fourth and last private relation is that of guardian and ward. And we shall consider, first, the legal condition of the ward ; next, the different species of guardians ; and, lastly, the rights and duties of guardians.

I. *The legal condition of the ward.*—Infancy or minority is the period of life, whether in males or females, which precedes the age of twenty-one—an age at which they are competent for all that the law requires them to do, and which is therefore designated as ‘full age’ (a). Full age is gained on the day preceding the twenty-first anniversary of the infant’s birth ; and as in the computation of time the law for this purpose allows no fraction of a day, a child born on the evening of the 1st January is of age on the morning of the 31st December in his twenty-first year (b).

[An infant has various special privileges, and is subject to various incapacities. He cannot be sued but under the protection, and with the benefit of the defence of, his guardian (c) ; that is, of his guardian *ad litem*, appointed by the Court for the purpose

(a) 1 Hale, P. C. 28 ; Co. v. *Dennington* (1704) 2 Ld. Litt. 171 b. Raym. 1096.

(b) *Herbert v. Turball* (1663) 1 Keb. 589 ; *Howard’s Case* (1700) 2 Salk. 625 ; 1 Ld. Raym. 480 ; *Fitz-Hugh* (c) Co. Litt. 135 b ; *Castle-dine v. Mundy* (1832) 4 B. & Ad. 90.

[of the particular action. And, on the other hand, he may sue either by a guardian *ad litem* appointed by the Court, or (what is much the more usual course) by his next friend or *prochein amy*: that is, by any friend willing to undertake his cause (a).] It is also a privilege belonging to infants, that they lose nothing during their minority by non-claim of their rights; for though persons of full age are barred by their omission to take any step towards the enforcing of their rights within a certain period of time, it is otherwise with respect to infants, who are not bound to claim upon a title or cause of action which first accrues to them while they are under age, until after the expiration of a period commencing from their attainment of majority (b). It is also laid down generally, that an infant can neither make any conveyance or purchase that will bind him (c); nor enter into a binding contract (with certain exceptions); nor be sworn as a juror (d); nor sit and vote in Parliament (e); nor hold any public office of pecuniary trust, or of a judicial kind (f), nor act and vote as a member of a corporation constituted for public purposes (g); nor, in short, do any legal act.

To this general incapacity, there are exceptions; and it will be proper here to advert to some of these. Thus, although an infant is generally under disability where he acts on his own account, yet he is under none when

(a) Co. Litt. 135 b; *Collins v. Brook* (1859) 4 H. & N. 270.

(b) Co. Litt. 380 b; Limitation Act, 1623, s. 7; Real Property Limitation Act, 1833, s. 16; Real Property Limitation Act, 1874, s. 3; Civil Procedure Act, 1833, s. 4.

(c) Co. Litt. 171 b.

(d) Bac. Ab. *Infancy*, E.; *Juries Act*, 1825 (6 Geo. 4, c. 50), s. 1.

(e) *Whitelock*, ch. 50; 4 Inst. 47; 7 & 8 Will. 3 (1695), c. 25.

(f) *Claridge v. Evelyn* (1821) 5 B. & Ald. 81; Bac. *ubi sup.*

(g) *Seymour v. Royal Naval School* [1910] 1 Ch. 806.

acting as *agent* for another person (*a*) ; for the person by whom he is appointed agent is, for that purpose, the best judge of his ability. [So an infant who has an advowson: that is, the perpetual right to present to a benefice, may present to the benefice when it becomes void (*b*). For the law in this case dispenses with one rule, in order to maintain another of far greater consequence ; permitting the infant to present a clerk, who, if unfit, may be rejected by the bishop, rather than suffer the church to be unserved, or the infant's right to be barred by lapse.] But, except in the case of a guardian in socage, the infant's right of presentation will be exercised by his guardian (*c*). Where the guardian is guardian in socage, the guardian cannot present ; but the infant's discretion will be controlled by the Court (*d*).

So an infant may be sworn as a witness, however young, provided he understands the nature of an oath (*e*) ; and in proceedings under the Criminal Law Amendment Act, 1885 (*f*), and the Children Act, 1908 (*g*), the evidence of a child of tender years, who in the opinion of the Court does not understand the nature of an oath, may, subject to the provisions of those Acts, be admitted. At the age of twelve an infant may also take the oath of allegiance (*h*) ; and at the age of fourteen, if a male, or of twelve, if a female, may consent to his or her own marriage (*i*). Again, though infants cannot, as a general rule, so aliene or purchase estates but that the transaction shall be voidable at their pleasure, on their attainment

(*a*) Co. Litt. 52 a ; *Re v. Coverley* (1732) 2 Eq. Ca. d'Angibau (1880) 15 Ch. D. Ab. 518.  
228, 246.

(*b*) Co. Litt. 89 a, note (1) ;  
172 b.

(*c*) *Hearle v. Greenbank*  
(1749) 1 Ves. sen. 298, 304.

(*d*) 3 Inst. 156 ; *Arthington*

(*e*) Hale, P. C. 278.

(*f*) S. 4.

(*g*) Ss. 29, 30.

(*h*) Co. Litt. 172 b.

(*i*) See *ante*, pp. 388—389.

of full age (*a*), yet they may make a feoffment at the age of fifteen of their gavelkind lands, provided that the feoffment is made upon an adequate consideration (*b*) ; and by the Infant Settlements Act, 1855 (*c*), any male infant of twenty years, or female infant of seventeen years, may, with the sanction of the Court, make a valid and binding settlement of either real or personal estate, in contemplation of his or her marriage.

Again, although, as a general rule, an infant cannot enter into a contract that shall bind him, yet there are many exceptions to the rule, which we have previously set out at some length (*d*), and which need not, therefore, be here repeated.

But though infants are thus, to a certain extent, exempted from liability for mere breach of contract, the law allows them no such privilege in respect of injuries of any other kind ; for not only are they answerable for *crimes* long before their attainment of full age, but an action also may be brought against them to recover damages for their *torts*, such as trespass, slander, and the like (*e*). But an infant is not liable for a wrong, such as deceit in representing himself to be of full age, which is so closely connected with a contract, that an action for such wrong would be an indirect method of enforcing the contract (*f*).

II. *The different species of guardians.*—The guardianships recognised by our law are of the following varieties :—

(*a*) Co. Litt. 2 b ; *Zouch v. Parsons* (1765) 3 Burr. 1794.

(*b*) Bac. Ab. iv. p. 49 (7th edn.) *tit. Gavelkind, A.* ; *In re Maskell and Goldfinch* [1895] 2 Ch. 525.

(*c*) 18 & 19 Vict. c. 43. (See *ante*, p. 109.)

(*d*) See *ante*, pp. 108—109.

(*e*) *Defries v. Davies* (1835)

1 Bing. N. C. 692 ; *Burnard v. Haggis* (1863) 14 C. B. (N.S.) 45.

(*f*) *Johnston v. Pye* (1665) Sid. 258 ; *Jennings v. Rundall* (1799) 8 T. R. 335. (As to the equitable obligation which may be incurred by an infant who represents himself as being of age, see *ante*, p. 109.)



1. *Guardianship by nature*.—This is said to belong to the father in respect of the person of his heir apparent, or of his heiress presumptive; there being, properly speaking, no other kind of guardianship by nature than this. And the term ‘natural guardian,’ as applied to the father or mother with reference to all their children, is rather a popular than a technical mode of expression. For when a father’s right to the person of a child who is not his heir apparent is intended, his guardianship is properly that next to be noticed (a). It has been doubted whether, since the abolition of tenures in chivalry, guardianship by nature can exist at all, in the strict sense of the term (b).

2. *Guardianship for nurture*.—This is a species of guardianship that applies to all the children, extending to the person only. It belongs to the father, and, at his decease, to the mother; and it lasts both with males and females only to the age of fourteen (c). The two species of guardianship above described, as distinguished from the parental right to the control and custody of an infant child, already dealt with in a previous chapter, appear to have no practical importance at the present day.

3. *Guardianship in socage*.—This is a species of guardianship which extends to the estate as well as to the person; and it occurs only where the legal estate in lands held in socage *descends* upon an infant (d), in which case the guardianship devolves upon his next of blood to whom the inheritance cannot descend (e). For

(a) Co. Litt. 88 b. (And see Hargrave’s notes, 11, 12 (18th edn.); *Ratcliff’s Case* (1593) 3 Rep. 38 b.)

(b) Macpherson, *Infants*, p. 57.

(c) Co. Litt. 88 b, Hargrave’s note 13 (18th edn.).

(d) *Ibid.* 87 b, n. (1).

(e) *Ibid.* 88; Bac. Ab. *Guardian*, B.

though proximity of blood is a natural recommendation to the office of guardian, the law judges it improper to trust the person of an infant in his hands, who may by possibility become the heir (*a*). Guardianship in socage, like that for nurture, continues only until the minor is fourteen years of age ; except in the case of lands held in gavelkind, where the office lasts a year longer (*b*).

4. *Guardianship by statute (commonly called testamentary guardianship).*—By the 12 Car. 2 (1660) c. 24, a father may, by deed or will, dispose of the custody of such of his children as are infants and unmarried at his death, or born posthumously, to any person he pleases ; and this as against all persons claiming to be guardians in socage or otherwise. The guardian thus appointed has the custody both of the person of the ward (*c*) and also of his or her estate, both real and personal (*d*). But, the statute having made no mention of the mother, she therefore remained incapable of appointing a guardian to her children (*e*). Her incapacity in this respect has, to some extent, been removed by the Guardianship of Infants Act, 1886, already mentioned ; by which, as we have seen, the rights of the father have been somewhat restricted in her favour (*f*).

5. *Guardianship by election*, which is a species of guardianship recognised by the law, though not of frequent occurrence. For an infant having lands in socage may, after fourteen, when the guardianship in socage terminates, elect a guardian for himself, if there

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|--------------------------------------|------------------------------------|
| (a) Glanv. l. 7, ch. xi ;            | 1 Ch. 391.                         |
| Stat. Hibern. 14 Hen. 3 (1235).      | (e) <i>Ex parte Edwards</i> (1747) |
| (b) Bac. Ab. <i>Guardian</i> , A. 2. | 3 Atk. 519.                        |
| (c) <i>Re Andrews</i> (1873) L. R.   | (f) 49 & 50 Vict. c. 27. (See      |
| 8 Q. B. 153.                         | <i>ante</i> , pp. 447-448.)        |
| (d) <i>Helyar v. Beckett</i> [1902]  |                                    |

be no other then ready to take charge of him and his property ; and, according to Lord Coke, the same thing may be done in certain cases by an infant under fourteen. But the law on this subject is obscure ; and the election, at whatever age it is made, in no case superseding the authority of the Court to interfere for the infant's protection, this kind of guardianship is now almost wholly disused (*a*).

6. *Guardianship by appointment of the High Court of Justice*.—This species of guardianship is of comparatively modern origin ; for, it being found expedient to provide for cases in which the father failed to exercise his statutory power, the Court, on an application made to it on behalf of an infant possessed of property, will appoint a guardian for the protection both of the person and of the property of the infant (*b*). And indeed this jurisdiction would be exercised, if sufficient reason appeared, notwithstanding the existence of a guardian in socage (*c*). And the Court interfered in favour even of bastards ; so that where the father had named a guardian by will for his bastard child, which he had no authority under the statute to do (*d*), the Court in general appointed that person the guardian, confirming the putative father's appointment (*e*). So, also, where there had been a guardian appointed under the statute, the Court would regulate his conduct, and even deprive him of all authority, where necessary for the real interests of the infant (*f*).

(*a*) Co. Litt. by Harg. 88 ;  
*Curtis v. Rippon* (1819) 4  
Madd. 462. The Court will  
have regard to the wishes of  
an infant aged ten in the  
matter of religious education  
(*In re W.* [1907] 2 Ch. 557).

(*b*) Co. Litt. 88 b, Har-  
grave's note 16 ; 2 Fonb.

*Equity*, 228 n.

(*c*) *Ibid.* 235.

(*d*) *Sleeman v. Wilson*  
(1871) L. R. 13 Eq. 36.

(*e*) *Peckham v. Peckham*  
(1816) 2 Cox, 46.

(*f*) Spence, *Equitable Juris-*  
*diction*, vol. i. p. 613.

And by the institution of a suit as to the estate of an infant, and even by a payment into court to the credit of the account of an infant in an administration action, though the infant is not a party, the infant becomes a *ward of court* (*a*). Any person marrying such a ward without permission is guilty of a contempt of court; and he or she, as well as the ward, is punishable by commitment to prison (*b*).

But an infant not possessed of property will not, in general, be made a ward; nor will the Court in general appoint a guardian for an infant so circumstanced. This is due, however, not to a want of jurisdiction in the Court, but merely to the difficulty of exercising such jurisdiction in the absence of property; and the Court has in proper cases appointed guardians of infants not possessed of any property (*c*). Statutory powers of appointing guardians have been conferred on the Court in particular cases. Thus, by the Infant Felons Act, 1840, the Court may take any infant, whether possessed of property or not, who has been convicted as a felon, out of the control of his parent or other guardian, and may assign the custody of him to any other person willing to be entrusted with his charge, and able to provide for his maintenance and education. By the Criminal Law Amendment Act, 1885 (*d*), the custody of a girl under sixteen years of age may, for the reasons mentioned in the Act, be taken away from her parents and committed to any person willing to have the charge of her. Under the Prevention of Cruelty to Children Act, 1904 (*e*), the Court might, for good cause, take away from the father or step-father, or other quasi-

(*a*) *De Pereda v. De Mancha* G. & Sm. 457; *Re Spence* (1881) 19 Ch. D. 451. (1849) 2 Ph. 247; *Re McGrath*

(*b*) *Herbert's Case* (1731) 3 [1893] 1 Ch. 143.

P. Wms. 116; *Re Martindale* (*d*) 48 & 49 Vict. c. 69, [1894] 3 Ch. 193; *Re H.'s* s. 12.

*Settlement* [1909] 2 Ch. 260. (*e*) 4 Edw. 7, c. 15, ss.

(*c*) *Re Fynn* (1848) 2 De 6—8.

guardian, and commit to some other fit person, the custody or care of a child under sixteen years of age ; and, under the Children Act, 1908 (*a*), still more drastic powers of a similar nature are conferred on justices of the peace. And, apart from all statutory provisions, the Court has power in extreme cases to take away from a guardian, and even from a father, the custody of his child, and to commit it to fit and proper persons ; when such a course is for the benefit of the child (*b*).

7. *Guardianship ad litem*.—This is where a person, usually the father or other ordinary guardian, is appointed by any court of justice to prosecute, or more commonly to defend, on behalf of an infant in any action or litigious proceeding therein pending, to which such infant may be party ; a practice to which we have already had occasion to refer in the course of this chapter (*c*).

8. *Guardianship by custom*.—This species of guardianship is described in the books as being of two kinds : first, that which exists in lands of copyhold tenure, and which, of common right, belongs to the next of blood to whom the copyhold cannot descend, though, by special custom, it may be claimed by the lord of the manor or his nominee (*d*) ; and, second, that which is founded on the custom of London, which entitled the mayor and aldermen, in their Courts of Orphans, to the custody of the person, lands, and chattels of every infant whose parent was free of the city of London, at least if he also died within the city. Such custody lasted, in the case of males, till

(*a*) S. 24.

(*b*) *Shelley v. Westbrook* (1822) Jacob, 266 ; *Wellesley v. Beaufort* (1827) 2 Russ. 21 ; *Re Besant* (1879) 11 Ch.D. 508.

(*c*) See *ante*, pp. 454—455.

(*d*) 2 Watk. Cop. 101 ; Co. Litt. by Harg. 88 ; *Anon.* (1578) 1 Leon. 266 ; *Clench v. Cudmore* (1691) 3 Lev. 395.

twenty-one, and in the case of females, till eighteen or marriage; but this custom, with other like customs in certain other municipal places, is now fallen into disuse (a).

III. *The rights and duties of guardians.*—1. The legal custody of the person of an infant belongs in general to the guardian; who, if the child be detained from him, may sue out a writ of *habeas corpus*, to have his ward brought before the Court, and delivered over, if of tender age, to himself (b). Where the father is the guardian, he is entitled in general to this remedy, even as against the mother (c); though, on the other hand, the mother of an illegitimate child may claim the possession of it upon *habeas corpus*, in preference to the reputed father (d). A child, however, who is of an age sufficiently mature to exercise a choice on the subject, will in no case be delivered over upon *habeas corpus* to its legal guardian, not even to the father; but will be allowed to leave the court in freedom (e). This rule is peculiar to applications by *habeas corpus*, the foundation of which is that some person is being detained against his will; for the law recognises and protects the right of the father to the control and custody of his infant children, even after they have attained years of discretion (f). The guardian may not, unless by the leave of the Court, take his ward, being a ward of court, out of the jurisdiction of the Court (g).

(a) Co. Litt. 88 b; Pulling, *Customs of London*, p. 196; *Wilkinson v. Miles* (1665) 1 Sid. 250; *Frederick v. Frederick* (1721) 1 P. Wms. 710.

(b) *Earl of Westmeath's Case* (1821) Jacob, 251; *R. v. Clarke* (1857) 7 E. & B. 186; *R. v. Barnardo* (1890) 24 Q. B. D. 283.

(c) *R. v. De Manneville* (1804) 5 East, 223; *R. v. Greenhill* (1836) 4 A. & E. 624.

(d) *Ex parte Anne Knee* (1804) 1 Bos. & P. N. R. 149.

(e) *R. v. Clarke* (1857) 7 E. & B. 186.

(f) *Re Agar Ellis* (1883) 24 Ch. D. 317.

(g) *Elliott v. Lambert* (1884) 28 Ch. D. 186.

2. With respect to the property of the ward, a guardian in socage is said to have, not barely an authority over, but the legal possession of, the land, as *dominus pro tempore*; and therefore he has a right either to demise it, or to occupy it himself for the ward's benefit (*a*). He is entitled, in his own name, to bring actions against trespassers (*b*). And a testamentary guardian is equally entitled to possession of the infant's land (*c*). But no guardian can, apart from statute, aliene the ward's estate, except by way of lease during the ward's minority; and a demise for a longer period becomes void, or at any rate voidable at the ward's option, as soon as the period of guardianship determines (*d*). A guardian by appointment of the Court has, in some respects, even less power over the ward's property; for he can receive of the profits of the infant's estate no more than the Court shall think fit to allow him for the infant's maintenance. And such guardian can grant no leases except with the sanction of the Court; though, on the other hand, such sanction will, under the Infants' Property Act, 1830, enable him to make a lease that will bind the infant even after he attains twenty-one, or to surrender, with a view to the renewal thereof, a lease vested in the infant (*e*). Further powers of selling, leasing, and otherwise dealing with the real estate of infants have been given by the Settled Land Acts, 1882 to 1890; under which, when a person who is in his own right entitled in possession to land is an infant, the land is for the purposes of these Acts settled land, and the infant is to be deemed tenant

(*a*) *Osborn v. Carden* (1565) Plowd. 293; *R. v. Sutton* (1835) 3 A. & E. 597.

(*b*) *Wade v. Baker* (1697) 1 Ld. Raym. 131.

(*c*) *Helyar v. Beckett* [1902] 1 Ch. 391.

(*d*) Bac. Ab. *Leases*, I. 9; *Roe v. Hodgson* (1750) 2 Wils. 129, 135.

(*e*) 11 Geo. 4 & 1 Will. 4, c. 65, s. 17; *Re Griffiths* (1885) 29 Ch. D. 248.

for life thereof. In such a case, the powers conferred by these Acts on tenants for life are to be exercised by the trustees of the settlement, or, if there are none, by such person and in such manner as the Court on the application of the infant's guardian or next friend may order (a). As regards the infant's personal estate, a parent or guardian appears to have no power, despite the express words of the statute of 1660, to receive or deal with it (b); except in so far as the Court may allow him to do so. Where, however, property is vested in trustees in trust for an infant, the trustees have power to pay to the infant's parent or guardian (if any), or otherwise to apply for or towards the maintenance, education, or benefit of the infant, the whole or any part of the *income* of such property (c); and wider powers are sometimes inserted in settlements and wills.

Every guardian of the estate, except, possibly, a manorial lord, is bound to give the ward, when he comes of age, an account of all that he has transacted on his behalf; and, upon such account, he must answer for all losses from his own wilful default or negligence. The ordinary method of enforcing this liability of the guardian is by proceedings in equity for that purpose, which may be instituted even during the ward's minority (d); but in taking such account, allowance will be made to the guardian for all his reasonable costs and expenses (e), although he is not permitted in any case to make a profit out of his ward's estate (f).

(a) Settled Land Act, 1882, ss. 59, 60. (See also Settled Estates Act, 1877, and Conveyancing Act, 1881, s. 41.)

(b) *Re Hellman's Will* (1866) L. R. 2 Eq. 362; *Re Cresswell* (1881) 45 L. T. 468; *Re Chatard* [1899] 1 Ch. 712.

(c) Conveyancing Act, 1881, ss. 42, 43.

(d) *Eyre v. Shaftesbury* (1722) 2 P. Wms. 119.

(e) Litt. s. 123.

(f) *Osborn v. Carden* (1556) Plowd. 293.



## BOOK IV.

### OF PUBLIC RIGHTS.



### PART I.

#### *OF THE CIVIL GOVERNMENT.*



HAVING now considered the rights and duties attaching to a man, individually considered, as regards both his person and his property, and having also now examined the rights and duties attaching to him in his private or domestic relations, or as a member of a family, we have next to contemplate him as a citizen or member of the community at large, and to treat of the rights and duties which attach to him in the capacity of citizen, which he exercises in common with the rest of the community. And this we propose to do under the head of *public rights* ; for duties being the correlative of rights, it will be unnecessary to refer to duties separately. Public rights, then, concern either the relation subsisting between persons in authority and those subject to such authority ; or they concern the social condition in general. And, inasmuch as persons in authority are either of a civil or of an ecclesiastical character, the whole subject of public rights resolves itself into, and may be discussed under, the following three titles : the Civil Government, the Church, and the Social Economy. We shall in the first instance devote our attention to the Civil Government.

## CHAPTER I.

## OF THE PARLIAMENT.

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THE public rights which first claim our attention, are those which concern the relation in which men stand to one another, as governors and governed, or, in other words, as magistrates and people. [Of magistrates, some are *supreme*, *i.e.*, are those in whom the sovereign power of the state resides, while others are *subordinate*, *i.e.*, derive all their authority from the supreme magistrate, and are accountable to him for their conduct. So long as states are in an early stage of organisation, the supreme magistracy, or the right as well of making, as of enforcing, and of interpreting the laws, is generally found to be vested (where it exists at all) in one man or one body of men—a conjunction which has been considered, not quite rightly, by political theorists to be necessarily inimical to true public liberty. But in a highly developed community like England, the governing power is usually divided into three branches, *viz.*, the legislative, the executive, and the judicial. It will be the business of this chapter to consider the legislative power, which is vested, by our constitution, in the Parliament.

Though the details of the story are by no means yet complete, it is now virtually certain, from the researches of modern historians, that Parliament, on its present lines, dates from the closing years of the thirteenth century, and especially from the year 1295, when King Edward the First, being then in great straits, decided to summon to Westminster a thoroughly representative

[assembly of the three estates or orders of the realm, viz., the nobles (including the prelates, who ranked as nobles or magnates), the secular clergy, and the commons. Before this date there had been in existence many institutions which, as it were, formed the materials out of which this new representative assembly was erected. Though the ancient *witan* of the Anglo-Saxon kingdoms had disappeared in practice, it may have survived in tradition, and, possibly, smoothed the way. Far more important was the Great Council of the Magnates, a body consisting of the chief tenants *in capite* (a) of the Crown (including the prelates and the greater abbots), which, constructed on feudal lines, had assembled with more or less regularity on important occasions ever since the Norman Conquest. In strictness, this body should have contained all the tenants *in capite* of the Crown ; for every tenant *in capite* was bound to give his advice, if called upon, to his immediate lord, the King, and, conversely, to be consulted by his lord on important occasions. But the inconvenience and expense of attendance on, perhaps, a distant Court, had, in practice, justified the abstention of the smaller tenants *in capite* ; and, though the famous provision of the Great Charter (b) for summoning a ‘common council of the realm’ recalls the existence of the theory, yet in fact the provision was never acted upon, and has generally been misunderstood.

In addition to the Great Council of the Magnates, there were, at the end of the thirteenth century, the convocations, or purely ecclesiastical assemblies of the two provinces of Canterbury and York, which had been rapidly assuming a regular and organised form during the earlier years of the thirteenth century, and may,

(a) See *ante*, vol. i. p. 112.

(b) Cap. 14. It is noteworthy that this clause was clearly regarded as tem-

porary, for it disappeared from the editions of the Charter which were issued after the death of King John.

[perhaps, have given Simon de Montfort his famous idea of a representative gathering (*a*). At any rate, it obviously suggested the inclusion of clerical ‘proctors’ in the Parliament of 1295.

Once more, in the ancient institution of the *county* or *shire court*, in which the freeholders of the county had from time immemorial been wont to assemble, and in the somewhat younger, but rapidly developing, councils and guilds of the chartered boroughs, King Edward the First found the material for his famous assembly; and it is not immaterial to observe that, in the county or shire court, there had long been in existence a practice of having the townships represented by the reeve, priest, and four best men (*b*). It must not be hastily supposed that these ‘best men’ were elected in any formal manner to represent the township in the shire court, still less that they were eager candidates for the office. Still, the fact of their presence as a familiar feature of a familiar institution would probably favour the policy of King Edward in applying his favourite maxim: ‘what touches all shall be approved by all’ (*c*).

After this brief introduction to the subject, we shall proceed to inquire wherein consists this constitution of Parliament, as it now stands, and has stood for the space of over six hundred years. And in the prosecution of this inquiry we shall consider, first, the manner and time of the assembling of Parliament; second, its constituent parts; third, the laws and customs of the Parliament, considered as one aggregate body; fourth and fifth, the laws and customs of each House separately; sixth, the methods of proceeding, and of

(*a*) In 1265, after the battle of Lewes.

(*b*) *Leges Henrici Primi* vii. (7).

(*c*) This maxim appeared in the preamble of the bishops’ writs which summoned them

to the famous Parliament of 1295. It was not, however, apparently, inserted in the writs sent to the lay peers and the sheriffs. (See Stubbs, *Select Charters*, pp. 484–487.)

[making statutes, in both Houses ; and last, the manner of the adjournment, prorogation, and dissolution of Parliament.

I. *As to the manner and time of assembling.*—No Parliament may be convened of its own authority, but by the authority of the Crown alone ; for although it is provided by the Meeting of Parliament Act, 1797, that, on the demise of the Crown, if there be then no Parliament in being, the last Parliament shall revive, yet, inasmuch as this revived Parliament was originally summoned by the Crown, this is no real exception from the rule. In this case, the Parliament sits again for six months ; unless sooner dissolved.

It is true that, by the Triennial Act of 1640, if the King neglected to call a Parliament for three years, the Chancellor or, failing him, the peers, might assemble and issue out writs for choosing one ; and in case of their neglect, the electors for counties and boroughs might meet and choose their own representatives. But that Act, as being detrimental to the royal prerogative, was repealed by the 16 Car. 2 (1664), c. 1. It is true also, that the Convention Parliament, which restored Charles the Second, met above a month before his return ; the Lords of their own authority, and the Commons in pursuance of writs issued in the name of the Keepers of the Liberty of England by authority of Parliament. But that was for the necessity of the thing ; and the first step taken after the King's return in 1660 was to pass an Act (12 Car. 2, c. 1), declaring the Convention Parliament to have been a good Parliament, notwithstanding the defect of the King's writ. Which declaration was reiterated by the 13 Car. 2 (1661) st. 1, cc. 7 and 14. It is likewise true, that at the time of the Revolution, A.D. 1688, the Lords and Commons, of their own authority and upon the summons of the Prince of Orange (afterwards King

[William), met in a convention, and therein disposed of the crown and kingdom. But this assembling also was of necessity ; and upon a full conviction that King James the Second had abdicated the government.

By the antient statutes of the realm, the King was bound to convoke Parliament every year, or oftener, *if need be (a)*. These last words are, however, so loose and vague, that the enactments in which they are found proved no effective barrier against the tendency, exhibited by the Tudor and Stuart monarchs, to dispense with the convoking of Parliament, sometimes for very considerable periods. Accordingly, by the Triennial Act of 1640, the sitting and holding of Parliaments was not to be intermitted above three years at the most ; and although, as has just been remarked, that Act was repealed at the Restoration, yet, by a significant reservation, the repealing statute expressly forbade the intermission of Parliament for more than three years *(b)*. The Bill of Rights, in 1689, contented itself on this point with merely providing that, for the redress of grievances, Parliaments ‘ought to be held ‘frequently.’ But, by the Triennial Act of 1694 *(c)*, the provision against intermission for more than three years was preserved.] The proclamation which summons a new Parliament must be issued at least thirty-five days before the day fixed for its meeting *(d)*. This provision is, of course, to allow time for the process of *election*, hereafter to be described. The importance of these provisions has been, however, much lessened in modern times by the course of public business ; the exigencies of which invariably lead to the assembling of Parliament in every year.

[II. *The constituent parts of Parliament.*—These are

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|----------------------------------|---------------------------|
| (a) 4 Edw. 3 (1330) c. 14 ;      | c. 2, s. 1.               |
| 36 Edw. 3 (1362) c. 10.          | (d) Meeting of Parliament |
| (b) 16 Car. 2 (1664) c. 1, s. 3. | Act, 1852, s. 1.          |
| (c) 6 & 7 W. & M. (1694)         |                           |

[the monarch in his royal or political capacity, and three estates of the realm, to wit, the Lords spiritual and temporal, the clerical proctors, and the Commons. The clerical proctors, though they are still summoned at the commencement of every Parliament, have, however, long since ceased to sit ; and Parliament has thus come to be a body consisting of two Houses, instead of the original three. This change has imperceptibly led to an alteration in the meaning of the familiar phrase ‘ three estates of the realm,’ which, as above stated, was originally used to signify nobles, clergy, and commons. By the time of Coke, apparently, the meaning adopted was that of Lords Spiritual, Lords Temporal, and the Commons ; but this was so obviously inconsistent with the arrangement of Parliament, that it was soon changed into Crown, Lords, and Commons, though this is, of course, wholly incorrect, for the Crown is not an estate of the realm, but *caput, principium, et finis* (a).

The Lords Spiritual and Temporal sit with the King in one House ; and the Commons sit by themselves in another. It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, and a branch only, of the legislature. The King is himself, therefore, a part of Parliament ; although the share of legislation, which at the present time in theory belongs to him under the constitution, consists in the power of rejecting rather than of resolving. In practice, however, the Crown’s right of veto has long since become obsolete ; not having been exercised for two hundred years. In the year 1693, William the Third refused his assent to the bill for triennial parliaments ; but was prevailed upon to permit it to be enacted two years afterwards. And in 1707 Queen Anne refused her assent to a Scotch militia bill (b).

(a) 4 Inst. 6.

(b) De Lolme, *Const. of**Engl.*, p. 404 ; 18 Lords’ Journ. 506.

[Let us now consider these constituent parts of the sovereign power, or Parliament; passing over for the present the King, who, with his divers prerogatives, will be the subject of later chapters.

And, first, the Lords Spiritual consist of the Archbishops of Canterbury and York, the Bishops of London, Durham, and Winchester, and the twenty-one seniors in office among the other bishops (*a*); being twenty-four bishops in all, besides the two archbishops. The Lords Spiritual have been supposed to hold certain antient baronies under the Crown; for William the Conqueror thought proper to change the spiritual tenure of frank-almoign, or free alms, by which the bishops had held their lands during the Saxon Government, into the feudal or Norman tenure by barony (*b*). And it is maintained by some writers, that it was in right of their succession to those baronies that the bishops were allowed seats in the House of Lords (*c*);] while, according to other authorities, they sat in virtue of their official wisdom. They are ‘Lords of Parliament,’ but not, strictly speaking, ‘peers of the realm’ (*d*).

And we may here observe, that, prior to the dissolution of the monasteries by Henry the Eighth, the Lords Spiritual comprised also twenty-seven mitred abbots and two priors (*e*); also, that after the union with Ireland, in 1801, there sat and voted in the House of Lords the Archbishops of Dublin and of Armagh alternately, together with three other Irish bishops. But, under the Irish Church Disestablishment Act, 1869, no archbishop or bishop of the Church of Ireland has, since the 1st January, 1871, occupied a seat in the House of Lords.

(*a*) Bishoprics Act, 1878, n. (1); Hallam, *Mid. Ages* s. 5. (12th ed.), vol. iii. pp. 4, 5.

(*b*) Gilb. *Hist. Exch.* 55; (*d*) Staunford, P. C. 158.

Spelm. 291. (*e*) Co. Litt. 97; Seld. *Tit.*

(*c*) Co. Litt. by Harg. 134 b, *Hon.* 2, 5, 27.



[The Lords Spiritual are now usually spoken of as a distinct state from the Lords Temporal, and are so distinguished in many Acts of Parliament ; yet in practice they are usually blended together under the one name of 'the Lords,' and, originally at any rate, they formed, with the lay peers, but one 'estate of the realm.' They vote together ; and the majority of votes binds the whole estate.]

Second, the Lords Temporal consist exclusively of peers of the realm, or persons of the rank of nobility ; whether they be dukes, marquesses, earls, viscounts, or barons. Of the Lords Temporal, the majority sit in their own right as peers of the United Kingdom ; but a certain number of them sit in a representative capacity, while the six Lords of Appeal in Ordinary are Lords of Parliament during their lives only (*a*). The representative peers are those who, under the respective Acts of Union with Scotland and Ireland (*b*), are elected to represent respectively in the House of Lords the bodies of the Scottish and Irish nobility—the Scottish representative peers being sixteen in number, elected for one parliament only, and the Irish twenty-eight, elected for life (*c*).

[The aggregate number of the Lords Temporal for the time being is indefinite, and may be increased at will by the power of the Crown. But it was decided in the Wensleydale Peerage Case, debated in the year 1856, that the power of the Crown does not extend to the creation of life members of the House of Lords,

(*a*) The Appellate Jurisdiction Acts, 1876 and 1913.

(*b*) See *ante*, vol. i. pp. 51–58.

(*c*) See, as to the election of the sixteen Scottish peers, the Union with Scotland Act, 1706, the Representative Peers (Scotland) Acts, 1847

and 1851 ; and, as to the election of the twenty-eight Irish peers, the Union with Ireland Act, 1800, the Representative Peers (Ireland) Act, 1857, and the Election of Representative Peers (Ireland) Act, 1882.

[except under the provisions of an Act of Parliament specifically authorising such creation.

Thirdly, the Commons consist of the representatives of the nation at large, exclusive of the peerage and the prelates ; and they are elected by the means that we shall presently have occasion to explain. Formerly the counties were represented by knights, and the cities and boroughs by citizens or burgesses ;] but the distinction between the qualifications of knights and burgesses, which had long been merely social, has now entirely ceased, as a consequence of the assimilation of the county with the borough franchise, under the Representation of the People Act, 1884, and the Redistribution of Seats Act, 1885, and the repeal of the Property Qualification Act of 1710 (*a*). In addition, the Universities of Oxford, Cambridge, and London are represented by persons chosen by their respective graduates ; as are also the Scottish Universities, and the University of Dublin (Trinity College).

The aggregate number of members of the House of Commons, under the Redistribution of Seats Act, 1885, is now 670 ; of whom 495 represent English, 72 Scottish, and 103 Irish constituencies. [But every member, though chosen by one particular district, once he is elected and returned, serves for the whole realm ; the end of his coming thither being not particular, but general—not barely to advantage his constituents, but the commonwealth as a whole—to advise the Crown (as appears from the ancient writ of summons) *de communi consilio super negotiis quibusdam arduis et urgentibus, regem, statum, defensionem regni Angliæ et ecclesiæ Anglicanæ concernentibus* (*b*). And

(*a*) This statute required a 'knight of the shire' to have an income of 600*l.* a year from land, and a 'burgess' 300*l.* a year. It was repealed in 1858.

(*b*) 4 Inst. 14. (The ancient form of writ has been replaced by a shorter form in English under the Ballot Act, 1872, s. 28).

[therefore he is not bound to consult with, or to take the advice of, his constituents upon any particular point; unless he himself thinks proper and prudent so to do.

These are the several parts of Parliament; and the consent of all three is in general required to make any new law that shall bind the subject. For though, in the time of the great civil war, the Commons once passed a vote (a), "that whatsoever is enacted or declared for law by the Commons of England in Parliament assembled, hath the force of law, . . . although the consent and concurrence of King or House of Peers be not had thereto," yet when the constitution was restored in all its forms, it was particularly enacted, by the 13 Car. 2 (1661), st. 1, c. 1, that if any person should advisedly affirm that both or either of the Houses of Parliament have any legislative authority without the King, such person should incur all the penalties of a *præmunire*; that is to say, should forfeit all his lands and goods, and should suffer imprisonment and lose all civil rights.]

But, though the consent of the Crown and both Houses is still normally required for every legislative act, yet provision has recently been made for solving the difficulty which must inevitably arise, in the event of the two Houses being strongly opposed to one another on a particular project. Thus, by the Parliament Act of 1911, it is enacted that, if a 'Money Bill' (i.e. a legislative proposal certified by the Speaker of the House of Commons to be concerned only with taxation, the public debt, accounts, or finances generally, of the central government), after passing the Commons and being sent to the House of Lords for consideration, does not, during the following month of the parliamentary session, receive the assent of that House without amendment, it may be presented

(a) 4th Jan. 1649.

to the Crown for the royal assent without it (*a*). And, with regard to public measures other than Money Bills, a similar provision is also contained in the Parliament Act ; with the important modification, that the measure in question, before being presented to the Crown, must have *thrice* passed the House of Commons in three successive sessions, and have thrice in such sessions been rejected, or, at least, not passed without amendment, by the House of Lords within one month of parliamentary session after it has been sent to that House (*b*). From this second provision, however, are excepted all measures proposing an extension of the maximum duration of a Parliament beyond its present maximum of five years (*c*) ; while it is also provided that two years must elapse (if the Act is to apply) between the second reading of the measure in the House of Commons on the first occasion and the third reading on the third (*c*).

[III. *The laws and customs of Parliament.*—The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds (*d*). It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal. All mischiefs and grievances that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal ; and, in its omnipotence, it can even regulate or new

(*a*) Parliament Act, 1911, s. 1.

(*b*) *Ibid.*, s. 2. (There are important provisions making it possible for the Commons to

accept amendments proposed by the Lords, without imperiling the measure.)

(*c*) S. 2 (1).

(*d*) 4 Inst. 36.

[model the succession to the Crown, alter the established religion, change the constitution, and, in short, do everything that is not naturally impossible.

It is also law, that if any person is made a peer, or is elected to serve in the Commons, yet the respective Houses, upon complaint and proof of any crime in such person, may adjudge him incapable of sitting as a member ; and this, by the custom of Parliament (a). For, as every court of justice hath laws and customs for its governance, so the High Court of Parliament hath also its own peculiar law, called the *lex et consuetudo parliamenti* (b) ; and matters appropriate exclusively to either House are determined by that House alone (c). Wherefore, the Lords will not suffer the Commons to interfere in settling the election of a peer of Scotland ; and the Commons do not allow the Lords to judge of the election of a burgess.

The *privileges* of Parliament are very considerable, and were originally established for the protection of its members, as well from being molested by their fellow-subjects, as from being oppressed by the Crown. Regarding these privileges, Sir John Fortescue, in the thirty-first year of Henry the Sixth, declared, “ that “ it hath not been used aforetime that the judges “ should in anywise determine the privileges of the “ High Court of Parliament ” (d).] But Lord Holt was of opinion, “ that the authority of Parliament “ being from the law, is circumscribed by the law ; “ and if the privilege is exceeded, the act is wrongful

(a) Whitelocke, *Parliament*, ch. 102 ; Lords' Journ. 3 May, 1620 ; 13 May, 1624 ; 26 May, 1725 ; Com. Journ. 14 Feb. 1580 ; 21 June, 1628 ; 21 Jan., 9 Nov. 1640 ; 6 Mar. 1676 ; 6 Mar. 1711 ; 3 Feb. 1769 ; 17 Feb. 1769 ; 3 May, 1783.

(b) 1 Inst. 11 ; 4 Inst. 50.

(c) 4 Inst. 15 ; *Burdett v. Abbot* (1811) 14 East, 150 ; *Stockdale v. Hansard* (1839) 9 A. & E. 1 ; *Bradlaugh v. Gossett* (1884) 12 Q. B. D. 271.

(d) Selden, *Baronage*, pt. 1, c. 4.

“equally with the act of a private individual” (a). Which opinion is the one latterly accepted (b).

[The two best-known privileges of Parliament are privilege of speech and privilege from arrest. As regards privilege of speech, the Bill of Rights of 1689 declared, that it was one of the liberties of the people, “that the freedom of speech and debates and proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament”; and accordingly this privilege is specifically demanded of the Crown by the Speaker of the House of Commons, at the opening of every new Parliament (c).] And as regards privilege from arrest, a peer is, by virtue of his dignity, exempt from arrest in civil cases at all times (d); and a member of the House of Commons is, by the privilege of Parliament, so exempt while the House is sitting, and also for such a period before the first meeting, and after the dissolution of a Parliament, as may enable him conveniently to come to the House from, and to return to, any part of the kingdom (e). [This immunity continues for forty days after every prorogation, and for forty days before the next appointed meeting (f); and thus, when (as not infrequently happens) there is an autumn session of Parliament, continues without break through the prorogation.

The courts antiently took cognisance of the privilege from arrest, by issuing a writ of privilege in the nature

(a) *Paty's Case* (1705) 2 Ld. Raym. 1114.

(b) *Stockdale v. Hansard* (1839) 9 A. & E. 1; (1840) 11 A. & E. 253; *Howard v. Gossett* (1845) 10 Q. B. 359.

(c) May, *Law of Parl.* (11th ed.) p. 59.

(d) *Countess of Rutland's Case* (1606) 6 Rep. 52 a; *Davis v. Lord Rendlesham*

(1817) 7 Taunt. 679. The privilege extends to the wives of peers as well as to peeresses in their own right (*Countess of Rutland's Case*, *ubi sup.*).

(e) *Cassidy v. Steuart* (1841) 2 Man. & G. 437.

(f) *E. of Athol v. Derby* (1672) 2 Lev. 72; *Goudy v. Duncombe* (1847) 1 Exch. 430.

[of a *supersedeas*, to deliver the member out of custody when arrested in a civil suit (*a*). For when a letter was written by the Speaker to the Judges, to stay proceedings against a privileged person, they rejected it as being contrary to their oath of office (*b*). But when the 12 & 13 Will. 3 (1700), c. 3, enacted that no privileged person should be subject to arrest or imprisonment, it was held that such arrest was irregular *ab initio*, and that the party might accordingly be discharged upon motion (*c*). There is, however, no precedent for any such writ of privilege in criminal proceedings, but only in civil suits; and as the 1 Jac. 1 (1604), c. 13, and 12 & 13 Will. 3 (1700), c. 3, speak only of civil actions, the claim of privilege is usually guarded so as not to extend to treason, felony, or breach of the peace (*d*).] Instances also are not wanting wherein privileged persons have been convicted of misdemeanours, and either committed or prosecuted to outlawry, in the middle of a session; and this limit to, or exception from, the privilege, afterwards received the approbation of Parliament (*e*).

As regards the writing and publishing of seditious libels, it was resolved by both Houses that there was no privilege in such a case (*f*). The principle of this resolution extends equally to every indictable offence; and the privilege is not available, where the arrest is for contempt of court or on a writ of attachment (*g*), provided such arrest be punitive in its nature, and not merely civil process to enforce obedience to the Court's

(*a*) *Skewys (executors) v. Shamond* (1545) Dyer, 59; 4 Pryn. Brev. Parl. 757. 17th Aug. 1641; Com. Journ. 20th May, 1675.

(*e*) Com. Journ. 16th May, 1726.

(*b*) *Hodges v. Moor* (N.D.) 1726.

Latch, 48; Noy, 83.

(*f*) *Ibid.* 24th Nov.; Lords' Journ. 29th Nov. 1763.

(*g*) *Gent-Davis v. Harris* Str. 985.

(*d*) 4 Inst. 25; Com. Journ. (1888) 40 Ch. D. 190.

order (a). Even in indictable cases, however, there belongs to the Houses of Parliament the right to receive immediate information of the imprisonment or detention of any member, with the reason for which he is detained (b); and the practice is recognised by divers temporary statutes for suspending the *Habeas Corpus* Act, which have usually provided, that no member of either House shall be detained, till the matter of which he stands suspected be communicated to the House of which he is a member, and the consent of the House be obtained for his commitment (c). But the usage has uniformly been, ever since the Revolution, that the communication has been subsequent to the arrest (d).

There were also, at one time, privileges of Parliament, protecting the lands and goods of the members, and even their menial servants, not only from illegal violence, but also from seizure under the civil processes of the courts of law. Even now, to assault a member of either House, or his menial servants, is a high contempt of Parliament, and is punished with the utmost severity; and peculiar penalties were at one time annexed to this offence by the 5 Hen. 4 (1403) c. 6, and 11 Hen. 6 (1433) c. 11. But all parliamentary exemptions from liability to civil process, save only as to the freedom of the person of the member himself, are now at an end; having been first restrained, and at length totally abolished, by the legislature. For, by

(a) *Re Armstrong* [1892] 1 Q. B. 327.

(b) Com. Journ. 20th April, 1762.

(c) See particularly 17 Geo. 2 (1743) c. 6; Protection of Person and Property (Ireland) Act, 1881; Peace Preservation (Ireland) Act, 1881; which was continued by the Peace Preservation (Ireland)

Continuance Act, 1886, by the Criminal Law and Procedure (Ireland) Act, 1887, s. 8, and by annual Acts up to and including 1905, when it expired.

(d) See *Mr. Gray's Case*, M.P. for Dublin, 1882, committed for contempt of court by Lawson, J.



the Parliamentary Privilege Act, 1770, it was enacted, in extension of certain previous statutes (a), that an action might be brought against a member of either House, or against his servants, or against any other person entitled to privilege of Parliament ; and that no such action, nor any process, or proceeding thereupon, should be impeached, stayed, or delayed by pretence of privilege, except that the person only of the member himself should not thereby be subjected to arrest.

In addition to the privileges of freedom of speech and of freedom from arrest, the right of Parliament freely to publish its own reports, papers, votes, and other proceedings, is now specially protected by statute. For it has been provided by the Parliamentary Papers Act, 1840, that any one sued or prosecuted on account of the publication of such matters by authority of either House, may have the proceedings against him stayed, and all process therein superseded, on production to the Court of a proper certificate of such authority ; and that no person shall be liable to any civil or criminal proceeding for printing extracts from, or abstracts of, parliamentary documents, provided he can show that he did so *bonâ fide* and without malice (*b*). It is moreover clearly settled, that in any case in which the privileges of either House of Parliament have been violated, that House has power to commit to prison the person guilty of such contempt (*c*) ; and also, by its order, to set at liberty any one who, in breach of its privileges, has been arrested in respect of any act by him done in his capacity of member of Parliament (*d*).

(a) 12 & 13 Will. 3 (1700) c. 3; 2 & 3 Anne (1703) c. 12; Parliamentary Privilege Act, 1737.  
(b) Parliamentary Papers Act, 1840, s. 3.  
(c) *Burdett v. Abbot* (1811) 14 East, 158.  
(d) 1 Jac. 1 (1604) c. 13.

These being the laws and customs of Parliament, regarded as one aggregate body, we will now consider the laws and customs of each House separately ; first, those of the House of Lords, and secondly, those of the House of Commons.

IV. *The laws and customs relating to the House of Lords.*—[One very antient privilege, worth mentioning only as illustrative of a former era, is that declared by the Charter of the Forest (*a*), of the ninth year of Henry the Third, viz., that every archbishop, bishop, earl, or baron, ‘coming to us at our commandment,’ passing through the King’s forests, may kill one or two of the King’s deer without warrant ; in view of the forester, if he be present, or on blowing a horn, if he be absent. In the next place, the peers have a right to be attended by the Judges, and also by certain of His Majesty’s Counsel, for the greater dignity of their proceedings ; and in the exercise of their appellate jurisdiction, it was often their practice to request the opinion of the Judges, in point of law, upon the question which was before them for their determination. But the power of summoning the Judges has only been exercised twice since the passing of the Judicature Act, 1873 (*b*). The Secretaries of State, with the Attorney and Solicitor-General, used also to attend the House of Peers, and have to this day, together with the Judges and the King’s Counsel above referred to, their regular writs of summons issued out at the beginning of every Parliament (*c*) ; but, whenever they have been members of the House of Commons (*d*), their

(*a*) *Carta de Forestâ*, c. 11, c. 10 ; Smith, *Commonw.*  
confirmed 25 Edw. 1 (1297). bk. ii. ch. iii. ; Moor, 551 ;

(*b*) *Dalton v. Angus* (1881) 4 Inst. 4 ; Hale, *Parl.* 140.

6 A. C. 740 ; *Allen v. Flood* (*d*) Com. Journ. 11th April,  
[1898] A. C. 1. 1614 ; 8th Feb. 1620 ; 10th

(*c*) Stat. 31 Hen. 8 (1539) Feb. 1625 ; 4 Inst. 48.

[attendance on the Lords has of late years fallen into disuse (a).]

Another privilege of the peers formerly was that every peer, by licence obtained from the Crown, might make another Lord of Parliament his proxy, to vote for him in his absence (b)—a privilege which a member of the other House neither can nor could have, as he is himself but a proxy for a multitude of other people (c).] But, by the Orders of the House itself, no proxy might vote on a question of guilty or not guilty; and only a spiritual lord could be proxy for a spiritual lord, and a temporal lord for a temporal lord. From 1868, even this restricted privilege has been waived in virtue of a resolution of the House; and all votes are now given in person (d). Every peer has a right, when a vote passes contrary to his sentiments, to enter, with the leave of the House, his dissent on its journals, with the reasons for such dissent; which is usually called his *protest* (e). All Bills that may in their consequences affect the rights of the peerage, are by the custom of Parliament to have their first rise and beginning in the House of Peers; and they are to suffer no changes or amendments in the House of Commons, though the latter House has the power of rejecting them altogether (f).

(a) There are several resolutions before the Restoration, declaring the Attorney-General, on account of this attendance, incapable of sitting among the Commons; and Sir Heneage Finch is said to have been the first Attorney-General who so sat.

(b) Seld. *Baronage*, p. 1, ch. 1.

(c) 4 Inst. 12; Com. *Dig.* Parl. D. 19; 1 Woodd. 41.

(d) Pike, *Const. Hist. of House of Lords*, 245.

(e) Lord Clarendon relates, that the first instances of protests with reasons, in England, were in 1641; before which time they usually only set down their names as dissentient to a vote (1 Ld. Mountm. 402; Pike, *ibid.* 246).

(f) Blackstone gives no authority for this remarkable statement, which has not been followed in modern practice. (See May, *Parliamentary Practice*, 11th edn., p. 460.)

By the Bankruptcy Disqualification Act, 1871, as amended by the Bankruptcy Act, 1883 (*a*), no writ of summons can be issued to a bankrupt peer; and every peer who becomes bankrupt is disqualified from sitting or voting in the House of Lords, until his bankruptcy shall have been determined as in the Acts provided. And the disqualification is now to be removed only if the adjudication is annulled, or if the bankrupt obtains his discharge with a certificate that the bankruptcy was caused by misfortune, and not by misconduct. Infancy (*b*) and conviction of felony (if followed by a sentence of sufficient magnitude (*c*)) also disqualify a peer from exercising his parliamentary functions; but lunacy is, apparently, no disqualification in the case of a peer.

V. [*The laws and customs of the House of Commons.*—These concern principally either the raising of taxes, or the election of members.

[And, first, with regard to the raising of taxes. It is the antient indisputable privilege and right of the House of Commons, that all grants or subsidies, or parliamentary aids, do begin in their House (*d*); although their grants are not effectual to all intents and purposes, until they have the assent of the other branch of the legislature, or, at least, of the Crown. The reason commonly given for this exclusive privilege is, that the supplies are raised upon the body of the people, and that it is proper, therefore, that they alone, through their representatives, should impose the taxes. A reason which would be unanswerable if the Commons taxed none but themselves; but the property of members of the House of Lords is equally taxable with that of the Commons. The true origin, therefore, of this special privilege seems rather to

(*a*) S. 32.

(*b*) S.O. 22nd May, 1685.

(*c*) Forfeiture Act, 1870, s. 2.

(*d*) 4 Inst. 29.

[have been this, that the Lords being an hereditary body, created, and so more liable than the Commons to be influenced, by the Crown, it would have been extremely dangerous to give them any power of framing new taxes. So jealous are the Commons of this privilege, that they will not permit the least alteration or amendment to be made by the Lords in any Money Bill, *i.e.*, any Bill by which any money whatsoever is directed to be raised upon the subject (*a*). From the year 1861 to the year 1909, the alleged power of the Lords even to reject a Money Bill was not exercised ; and an attempt to insist upon it in the latter year led, after a General Election, to the passing of the Parliament Act, 1911, under which, as we have seen (*b*), the power of the House of Lords to reject, amend, or even seriously to delay a Money Bill, has been formally abolished.

Second, with regard to elections. The election of members to serve in the House of Commons is the act of the people at large ; and in considering this matter, we shall have to consider—(1) the qualifications of the electors ; (2) the qualifications of the elected ; and (3) the proceedings at elections.

1. *As to the franchise, or qualifications of the electors.*—The reason of requiring a qualification in voters is to exclude such persons as are in so mean a situation as to be specially open to the undue influence of others ; and although, upon the true principles of liberty, every member of the community, however poor,

(*a*) According to Sir Matthew Hale (*Parliaments*, 65, 66), it was allowable for the Lords to alter a Money Bill by *shortening* the period for which a tax is granted ; and in such case, he was of opinion that the Bill need not be sent back to

the Commons for their concurrence. But this view, if it ever was correct, can certainly not be maintained since the passing of the Parliament Act, 1911, s. 1. (See *ante*, p. 476.)

(*b*) See *ante*, p. 476.

[should have a vote, and it has been one of the objects of our constitution to secure him some share in the election of representatives, yet the rights of property cannot be wholly disregarded.]

And, first, of the qualifications which belong to the electors for COUNTIES. The knights of shires, that is to say, the members for counties, were for long considered to be peculiarly representative of the landed interest ; and their electors were, down to the second quarter of the nineteenth century, required to have estates in lands or tenements within the county represented, and also, until the requirement was abolished by the 14 Geo. 3 (1774) c. 58, to be resident within that county. An estate of the value of 40s. per annum of free tenure, in which the voter had also a freehold interest, was from 1430 the invariable qualification for the franchise (*a*). And the law so continued until the year 1832, when, by the Representation of the People Act, 1832 (commonly called the 'Reform Act'), the property vote in the counties was amended by the abolition of the forty shilling freehold franchise, unless acquired by settlement or devise, or for an estate of inheritance. The same Act admitted, however, a general landed property franchise (freehold, copyhold, or long leasehold) of the annual value of ten pounds, and an occupation or short leasehold franchise of fifty pounds a year. The Reform Act of 1867 reduced the property qualification in the counties from ten pounds to five, and the occupation franchise from fifty pounds to twelve ; while the Reform Act of 1884 introduced into the counties the residential and the ten pound lodger franchises. Thus, the qualifications or 'franchises' which, *primâ facie*, entitle a man to vote at a county election are :—

- (1) *Property franchise*.—The ownership of a freehold, copyhold or customary, or leasehold interest in land, of the annual value of five pounds ; or of a

(*a*) 8 Hen. 6 (1429) c. 7 ; 10 Hen. 6 (1432) c. 2.

freehold interest in occupation, or, if not in occupation, of inheritance, or acquired by marriage settlement, devise, benefice, or office. But the leasehold interest must have been originally for at least sixty years (*a*); and no premises which would entitle the owner to an occupation vote in a parliamentary borough can qualify for ownership franchise in the county (*b*).

- (2) *Short leasehold franchise*, being the ownership of leasehold premises worth at least fifty pounds a year, under a lease originally for at least twenty years (*a*).
- (3) *Occupation franchise*.—Occupation of land of ten pounds yearly value, accompanied by payment of poor rates (*c*).
- (4) *Residential household franchise*.—Inhabitant occupancy of a rateable tenement (which need not be a whole house) in respect of which the rates have been duly paid (*d*).
- (5) *Lodger franchise*.—Occupation, as a lodger, of premises of the clear yearly value of ten pounds, unfurnished (*d*).

And, second, of the qualifications which belong to the electors for **BOROUGH**S.

The antient borough franchise, as it stood on the eve of the Reform Act, 1832, was a mass of anomalies and inconsistencies, due chiefly to the fact, that the parliamentary qualification had become mixed up with the municipal qualification in chartered boroughs, which varied almost in each case. There was nothing of the uniformity of the county forty shilling franchise; except, perhaps, in those few instances in which the

(*a*) Representation of the People Act, 1832, s. 18; R. P. Act, 1867, s. 5.

(*b*) R. P. Act, 1832, ss. 24,

25.

(*c*) *Ibid.* s. 6; R. P. Act, 1884, s. 5.

(*d*) R. P. Act, 1884, s. 2.

borough was governed as a county (*a*). In the others, the anomalies and complexities were not only the cause of frequent disputes and contested elections; they directly favoured the acquisition of corrupt influence by wealthy patrons. In other words, they were the chief elements in the system of 'close' or 'rotten' boroughs.

The Reform Act of 1832, subject to a due regard to vested interests (*b*), swept away the whole mass of these anomalies, and substituted therefor a simple and uniform ten pound occupation franchise; while the Act of 1867 added the resident household and lodger franchises, much on the lines that we have described above (*c*) in speaking of the county franchise. But neither of these Acts introduced the property franchise into the boroughs, where, therefore, it has no place; except in the anomalous 'counties of towns' and 'counties of cities' previously referred to. The borough franchises, making allowance for a few exceptional cases, stand, therefore, as follows:—

- (1) *Occupation franchise*—of ten pounds annual value, as in the counties; except that the claimant must have resided, for six months of the qualifying year, in or within seven miles of the borough (*d*).
- (2) *Residential household franchise*—as in the counties (*e*).
- (3) *Lodger franchise*—as in the counties (*f*).

In distinguishing between these various classes of franchise, the chief care of the student should be to

(*a*) These rare boroughs were known as 'counties of towns,' or 'counties of cities.' They still survive, and may be readily recognised by their enjoyment of the office of sheriff.

(*b*) The most important of these is the franchise acquired

by 'freemen' of the boroughs as such. But the privilege, except in London, was much restricted by the Act.

(*c*) See *ante*, p. 488.

(*d*) R. P. Act, 1832, s. 27; R. P. Act, 1867, s. 7.

(*e*) *Ibid.* s. 3.

(*f*) *Ibid.* s. 4.



note carefully the differences, not always easy to grasp, between the three processes of occupation, residence or inhabitancy, and lodging. 'Occupation' merely means the exclusive right to possession; and may apply equally to a bare field, a warehouse or counting house, a set of professional chambers, or a dwelling-house. 'Residence,' or 'inhabitancy,' does not necessarily imply sole possession; but it does imply actual living in a dwelling-house, while a man need never have actually seen the place which he 'occupies' (a). 'Lodging' is, unfortunately, a term about which there has, recently, been so much dispute, that a writer may well shrink from any attempt to define it (b). But, broadly speaking, a lodger is a resident in part of a dwelling-house or tenement, the general control of which is in the hands of another person (the householder), but who yet has, in respect of his own part of such tenement, sufficient control to make him, in a sense, master thereof, though not so much so as an ordinary householder (c).

A somewhat anomalous exception from these general rules is the case of the care-taker, who, by reason of his residence in a non-domestic building of which his employer is occupier, is entitled, though not separately rated, to vote as an inhabitant occupier, or resident (d). This qualification is known as the 'service franchise,' and applies equally to counties and boroughs.

It is, perhaps, an historical weakness that, in the treatment of the subject above adopted, the borough franchises should have been enumerated by reference to the county; as though they had been derived from

(a) Of course it is not contended, that mere residence ever confers the franchise. The so-called 'residential franchise' is that of the inhabitant occupier, *i.e.* the man who is both resident and occupier.

(b) See *Kent v. Fittall* [1909] 1 K. B. 215, and the many cases which follow it.

(c) *Kent v. Fittall* [1906] 1 K. B. 60.

(d) R. P. Act, 1884, s. 3.

the latter. The reverse is, in truth, the fact ; as the short historical statement prefixed to each class of franchises will make clear. The modern occupation, household or residential, and lodger franchises were all first applied to the boroughs, and then extended to the counties.

In order, however, that such a complicated system of franchises should be at all workable in a populous community like England, it is necessary that an official register of voters should be prepared in each constituency, and regularly kept up to date ; so as to be ready for an election, which may, perchance, take place at the most unexpected moment. It is, therefore, a condition precedent to any exercise of the franchise, that the person claiming to exercise it should be *registered* as a voter (*a*).

The present system of registration, which depends on the Registration Act, 1885, and is the same for counties and boroughs, is shortly as follows. On or within seven days before the 15th of April in each year, the clerk of the county council in a county, and the town clerk in a borough, send to the overseers of the poor of every parish and township, precepts to make out lists of persons having a right to vote within their several areas. In accordance with these precepts, the overseers make out lists of voters according to their several qualifications, and publish the same on or before the 1st of August ; except that the list of those claiming to be registered as occupation voters, and the list of lodgers claiming to be registered for the first time or under a new qualification, need not

(*a*) Representation of the People Act, 1832, s. 26 ; Parliamentary Voters Registration Act, 1843, s. 2 ; County Voters Registration Act, 1865 ; Representation of the People

Act, 1867, ss. 3-6, &c.

The Registration Order, 1895, contains the instructions, precepts, notices, and forms, under the Registration of Electors Acts.

be published till the 25th of August. Subsequently, between the 8th of September and the 12th of October, the several lists, together with the register of the preceding year, are examined into by Revising Barristers, appointed for the purpose (*a*), who hold open courts in order to determine, in every case of objection, the validity of the lists, and from whose decision on any point of law there is an appeal to the King's Bench Division (*b*). These lists and registers, when corrected, are transmitted by the Revising Barristers to the clerk of the county council in the case of counties, and to the town clerk in the case of boroughs. The lists are then printed in a book (*c*); which book must, before the last day of December, be delivered, in the case of a county to the sheriff, and, in the case of a parliamentary borough, to the returning officer. On being so delivered, it becomes the register of the electors for the county or borough for the year commencing on the 1st day of January next after the register is made (*d*).

(*a*) Under the Parliamentary and Municipal Registration Act, 1878, it is provided that where the whole or part of the area of a municipal borough is co-extensive with or included in the area of a parliamentary borough, the lists of parliamentary voters, and the burgess lists shall, as far as practicable, be made out and revised together (ss. 15, 28).

(*b*) As to the appeal, see Parliamentary and Municipal Registration Act, 1878, s. 37; and Supreme Court of Judicature Act, 1881, s. 14. As to the appointment of revising barristers, their duties, &c., and appeals from them, and

as to assistant revising barristers, see Parliamentary Voters Registration Act, 1843, ss. 28 *et seq.*; County Voters Registration Act, 1865; Revising Barristers Acts, 1866, 1873, 1874, and 1886; Parliamentary and Municipal Registration Acts, 1878 and 1885; County Electors Act, 1888, ss. 9, 10; and *Willis v. Maclachlan* (1876) 1 Ex. D. 376. And as to the expenses of elections, see Municipal Registration Act, 1878, s. 30; County Electors Act, 1888, s. 8; and Registration of Electors Act, 1891.

(*c*) Parliamentary Voters Registration Act, 1843, s. 47.

(*d*) *Ibid.* s. 49.

It must, however, be noticed that, subject to an exception presently to be mentioned, no person may be put on the register in any year, as a freeholder, or as a copyholder or customary freeholder, unless he has been in the actual possession of the property in respect of which he claims, or in the receipt of the rents and profits thereof for his own use, for six calendar months at least, next previous to the 15th day of July in that year (*a*); nor as a leasehold ownership voter, or 50*l.* leaseholder, unless he has been in receipt, possession, or occupation, as the case may require, of the qualifying property, for twelve calendar months next previous to that date (*b*). But this, as above mentioned, is subject to an exception, viz., that if the qualifying premises have come to the person claiming to be registered, at any time within these respective periods, by descent, succession, marriage, marriage settlement, devise, or promotion to any benefice in the Church, or by promotion to any office, he may claim to have his name inserted as a voter in the then next lists, and be registered accordingly; no length of possession or receipt of profits being in those cases required (*c*).

Moreover, with regard to the franchise acquired, under the Representation of the People Acts, by the occupation, as owner or inhabitant, of lands or tenements of the qualifying value, the person

(*a*) Representation of the People Act, 1832, s. 26. See Representation of the People Act, 1867, s. 5; Parliamentary and Municipal Registration Act, 1878, s. 7; Registration Act, 1885, s. 12.

(*b*) See *ante*, pp. 487–488, as to these franchises. By the Parliamentary Voters Registration Act, 1843, s. 73, 50*l.* leaseholders were enabled

to vote for the county in respect of different premises occupied in immediate succession for the twelve calendar months—a provision which, by the Representation of the People Act, 1867, s. 26, was extended to the occupation of different premises in immediate succession in boroughs.

(*c*) Representation of the People Act, 1832, s. 26.

claiming must, during the preceding twelve months, have been rated to all poor rates, if any, made and allowed in respect of the premises, and must, before the 20th July in the same year, have paid all poor rates which became payable up to the preceding 5th January (*a*), unless, under the compounding Acts, such rates ought to have been paid by his landlord (*b*).

A person once entered on the register need, as a rule, make no fresh claim for any succeeding year; so long as the nature of his qualification and his place of abode remain the same (*c*). But in the case of a lodger, the claim to be registered is an essential part of the qualification; and a fresh claim must be made every year (*d*).

Such is the substance of the present law with respect to the qualification of parliamentary electors for counties and for boroughs generally considered; and it remains only to notice certain electoral incapacities and restrictions.

First, no vote can be given by any woman (*e*); nor by any but a man of full age (*f*), who is a British subject, not subject to any legal incapacity, such, for example, as arises from being a lunatic, idiot, or outlaw in a

(*a*) R. P. Act, 1832, s. 27; 1867, s. 3; 1884, ss. 2, 5; Registration &c. Act, 1885, s. 18.

(*b*) Poor Rate &c. Act, 1869, ss. 3–8; Registration &c. Act, 1878, s. 14.

(*c*) Parliamentary Voters Registration Act, 1843, ss. 5, 6, 79.

(*d*) *Hersant v. Halse* (1886) 18 Q. B. D. 412.

(*e*) See Representation of the People Act, 1832, ss. 19, 20, 27; *Chorlton v. Lings* (1868) L. R. 4 C. P. 374; and

*Nairn v. St. Andrews* [1909] A. C. 147. Women may vote in Municipal Elections (Municipal Corporations Act, 1882, s. 63); also in County Council Elections (Local Government Act, 1888, s. 2); also in Parish Council Elections in respect of occupation, but not in respect of ownership (*Drax v. Ffooks* [1896] 1 Q. B. 238; Local Government Act, 1894, ss. 2, 43).

(*f*) 7 & 8 Will. 3 (1696) c. 25, s. 7.

criminal suit (*a*), or from having been convicted of treason or felony (*b*), or of a corrupt or illegal practice at any election (*c*).

Second, no person can vote in right of any estate conveyed to him for the purpose of conferring the franchise, if made subject to a condition for defeating the conveyance when that object is accomplished; and any person who executes or prepares such conveyance, or gives his vote under it, is made liable to forfeit 40*l.* (*d*).

Third, only one person can be admitted to vote in respect of the same house or tenement (*e*). But this is only when a splitting of interests is made for election purposes, and in order to multiply votes, as by the creation of 'faggot votes'; and the restriction consequently extends not to cases of *bond fide* joint occupation or tenancy, nor to cases where there is a division by operation of law, as in descents, nor to the ten pound occupation franchise, the lodger franchise, or the fifty pound rental franchise.

Fourth, no peer, other than an Irish peer actually elected to the House of Commons, can be allowed to

(*a*) In the case of lunacy, it does not appear that any degree of infirmity necessarily disqualifies (Rogers, *Elect.* (16th edn.), p. 194).

(*b*) Forfeiture Act, 1870, s. 2. But a *pardon*, or the completion of the term of the punishment, restores competency. *Secus*, as to convict with ticket of leave. (See Penal Servitude Act, 1864.)

(*c*) Corrupt and Illegal Practices Prevention Act, 1883, ss. 6, 10. In the case of corrupt practices, the disqualification is for seven years, and extends to any con-

stituency; in the case of merely illegal practices the disqualification is for five years, and only in the constituency where those practices were committed.

(*d*) Elections (Fraudulent Conveyances) Act, 1711, s. 1.

(*e*) 7 & 8 Will. 3 (1696) c. 25, s. 7; Parliamentary Elections Act, 1813. The practice of splitting votes for election purposes was not always viewed with jealousy; but 'faggot votes' have now been effectually abolished by the Representation of the People Act, 1884, s. 4.

vote at any election of a member of the House of Commons (a).

Fifth, no metropolitan police magistrate can vote within his jurisdiction (b).

Sixth, certain persons are disqualified by the nature of their employment, *e.g.*, persons employed in certain capacities by candidates at elections (c).

Seventh, no person may be registered in any year as a voter who, within the twelve calendar months next previous to the 15th day of July in that year, has received parochial relief, or disqualifying alms (d).

[The electors of citizens and burgesses, and the representatives of the cities and towns, were supposed in law to be, or to represent, the trading interest of the kingdom; and, inasmuch as trade was seldom

(a) This point was decided by the Common Pleas in the year 1872, on a claim to vote advanced by Lord Beauchamp (see *Earl Beauchamp v. Overseers of Madresfield* (1872) L. R. 8 C. P. 245); and, in the year 1907, on a claim by the Marquis of Bristol, the King's Bench Division came to a similar conclusion.

(b) Metropolitan Police Courts Act, 1839, s. 6. There used to be a similar incapacity attaching to the metropolitan and City police (Metropolitan Police Act, 1829, s. 18; 2 & 3 Vict. c. xciv. s. 7), and to the rural police (County Police Act, 1839, s. 9). But all these incapacities have now been removed by the Police Disabilities Removal Act,

1887. Revenue officials were enfranchised by 31 & 32 Vict. (1868) c. 73, and 37 & 38 Vict. (1874) c. 22.

(c) Representation of the People Act, 1867, s. 11.

(d) Representation of the People Act, 1832, s. 36; Representation of the People Act, 1867, s. 40; Parliamentary and Municipal Registration Act, 1878, ss. 7, 12. Before 1867, receipt of parochial relief did not disqualify in the case of a county voter. As to the nature of the alms the reception of which disqualifies, see *R. v. Halesworth* (1832) 3 B. & Ad. 717, and *Harrison v. Carter* (1876) 2 C. P. D. 26. Medical relief is no longer a disqualification (Medical Relief Disqualification Removal Act, 1885).

[long fixed in one place, it used to be left to the Crown to summon, *pro re natâ*, the most flourishing towns to send representatives to Parliament. So that, as towns increased in trade, and grew in population, they became, one by one, raised to the rank of parliamentary boroughs.] But many towns, which from an obscure original had risen to high importance, remained unrepresented; except as forming part of the county in which they lay (*a*). Also, many towns which had lost their importance still continued to return members (*b*).

Accordingly, the question of *redistribution* of seats had, before the end of the eighteenth century, become almost as pressing as the reform of the franchise, and, by the Representation of the People Act, 1832, a new arrangement was made, under which the representation of the trading and manufacturing interest was placed upon a different basis; no towns of conspicuous importance being then left unrepresented, while those which had fallen into comparative insignificance were deprived of their rank as parliamentary boroughs (*c*),

(*a*) See Chitty, *Prerog. of the Crown*, 67, 68; 1 Doug. *Elect.* 69.

(*b*) A few, however, had from time to time been eased of their parliamentary franchise, upon their own petition; having been desirous of avoiding the burthen then incumbent upon boroughs of paying *wages* to their representatives. This burthen also then lay upon counties; the wages for a knight of the shire being 4*s.* a day, and for a citizen or burgess, 2*s.*, according to the rate established in the reign of Edward the Third.

(*c*) The boroughs thus disfranchised are mentioned in

the Representation of the People Act, 1832, Sched. A. In Sched. O. of the Parliamentary Boundaries Act, 1832, the different places then sending members to parliament are enumerated, and their boundaries defined. (See s. 35.) By the Representation of the People Act, 1867, s. 48, boundary commissioners were appointed to revise these boundaries; and a subsequent Act (the Boundary Act, 1868) settled and described the limits of certain boroughs, and the divisions of certain counties, for the purpose of parliamentary elections. As to *detached* parts of counties,



and the larger and more populous counties were broken up into smaller constituencies. Afterwards, by the Representation of the People Act, 1867, some further efforts were made in the same direction, by reducing the number of members returnable for places of comparatively small population, and increasing those returnable for the more important towns; while, at the same time, certain new boroughs were created in districts hitherto insufficiently represented (*a*). And under the Redistribution of Seats Act, 1885, the representation of numbers was made, as nearly as might be, uniform in boroughs, as in counties, all over the kingdom; though subsequent changes of population have introduced grave anomalies. So closely, indeed, were county and borough constituencies assimilated by this last measure, that the distinction between them is now almost arbitrary, though the legal differences are important. The chief of these are, as we have seen, that, in the counties, residence is not required, as it is in the boroughs, as a qualification for the occupation franchise (*b*), while, on the other hand, the mere ownership of property does not confer the franchise in the boroughs (*c*).

With respect to the universities of Oxford and Cambridge, their representation in the House of Commons rests upon a different principle. In the earliest days of Parliament, they were not, as a rule, specially represented in Parliament; [though once, in the twenty-eighth year of Edward the First, when see the Counties (Detached Parts) Act, 1844.

(*a*) By the Representation of the People Act, 1867, s. 17, any borough which, at the census of 1861, had a population of less than 10,000 was thenceforth to return not more than a single member—a provision which deprived

thirty-eight boroughs of one of their members. But, on the other hand, Manchester, Liverpool, Birmingham, and Leeds each thereafter returned three members instead of two (s. 18).

(*b*) See *ante*, p. 489.

(*c*) *Ibid*.

[a parliament was summoned to consider of the King's right to Scotland, there were issued writs which required the University of Oxford to send up four or five, and that of Cambridge two or three, of their most discreet and learned lawyers for that purpose (a). It was James the First who indulged these universities with the permanent privilege of sending members of their own body to protect in the legislature the rights of the republic of letters ;] and a similar privilege has since been conferred on the universities of London, Dublin, Edinburgh, St. Andrews, Glasgow, and Aberdeen (b).

2. *As to the qualification of the elected.*—*Primâ facie*, any male British subject of full age, is capable of being elected to the House of Commons for any constituency. But there are, in addition to the disqualifications of sex and infancy implied in this statement, special disqualifications, which must be alluded to in detail. Some of these disqualifications depend upon the law and custom of Parliament, declared by the House of Commons itself ; while others depend upon particular statutes. Again, some are in respect of personal incapacity or misconduct, and others in respect of holding some office or employment considered to be incompatible with a seat in Parliament.

And first, among those who are disqualified in respect of personal incapacity are :—

(i.) English and Scottish peers (c) ;

(ii.) infants—this was part of the custom and law

(a) 1 Prynne, *Parl. Writs*, 345.

(b) The universities of Edinburgh and St. Andrews send one representative, and those of Glasgow and Aberdeen another (see Representation of the People (Scotland) Act, 1868). As to London,

see Representation of the People Act, 1867 ; and as to Dublin, see Representation of the People (Ireland) Acts, 1832 and 1868.

(c) But an Irish peer is eligible for a constituency in Great Britain ; unless he has been previously elected to

of Parliament; but the disqualification was not infrequently disregarded before the Reform Act, 1832, although made statutory in 1696 (*a*);

(iii.) women (*b*);

(iv.) lunatics and idiots (*c*).

As regards lunatics, the House of Commons would not formerly vacate a seat for lunacy except it were incurable. But now, by the Lunacy (Vacating of Seats) Act, 1886 (*d*), it is provided that when any member of the House of Commons becomes a lunatic, and is received into an asylum or house for lunatics, the Speaker must be certified accordingly by the proper authority, and must thereupon cause the member to be examined by the Lunacy Commissioners, and, after six calendar months, again examined by them; and if they report on each occasion that he is or continues a lunatic, his seat thereupon becomes vacant;

(v.) persons who have been convicted of treason or felony, or have been outlawed in a criminal prosecution (*e*)—it will be observed that this does not include persons convicted of *misdemeanor*, but in such cases the House may resort to its power of expulsion; and

(vi.) aliens—and between 1700 and 1870 even naturalisation did not always avail to remove the disqualification (*f*).

(vii.) Under the Corrupt Practices Act, 1883, any

serve in the House of Lords 79.

as a representative peer  
(Union with Ireland Act,  
1800, Art. 4).

(a) Whitelocke, ch. 50; 4  
Inst. 47; Com. Journ. 16  
Dec. 1690; 7 & 8 Will. 3,  
c. 25, s. 8. See the cases of  
Charles James Fox and Lord  
John Russell.

(b) *Beresford-Hope v. Lady  
Sandhurst* (1889) 23 Q. B. D.

(c) Com. Dig. *Parliament*,  
D. 9; Sheph. *Elect.* 109.

(d) 49 & 50 Vict. c. 16.

(e) Rogers, *Elect.* (18th edn.)  
vol. II. p. 32; Forfeiture Act,  
1870, s. 2.

(f) Com. Journ. 10 March,  
1623; Act of Settlement,  
1700, s. 3; Naturalisation  
Act, 1870, ss. 2, 7.

candidate reported by the election court to have known of and consented to the commission of corrupt practices, other than undue influence or treating at an election, or found guilty of treating or undue influence, is disqualified for ever from serving for the constituency in question, and, for seven years, from serving for any other constituency (*a*). Even if his agent has committed corrupt practices without his knowledge or consent, he is disqualified for seven years for that constituency (*b*).

(viii.) Under the provisions of the Bankruptcy Act, 1883, a debtor adjudged bankrupt cannot be elected to, or sit or vote in, the House of Commons; unless and until his adjudication is annulled, or unless he obtains his discharge, together with a certificate that his bankruptcy was caused by misfortune, and not by misconduct (*c*).

(ix.) By the provisions of various old statutes (*d*), no member could at one time either vote or sit in either House till he had taken the several oaths of allegiance, of supremacy, and of abjuration, and made a declaration against transubstantiation. But now, by various stages (*e*), all these requirements have been swept away, and the only profession exacted from a newly elected member is that of simple allegiance to the Crown (*f*)—a profession which, by virtue of the Oaths Act, 1888, may be made either by oath or by simple affirmation.

Second, among those incapacitated by office or

(*a*) Corrupt and Illegal Practices Prevention Act, 1883, ss. 4, 6. (See *post*, pp. 512–514.)

(*b*) *Ibid.* s. 5.

(*c*) Bankruptcy Act, 1883, s. 32.

(*d*) 30 Car. 2 (1678) st. 2; 13 & 14 Will. 3 (1701) c. 6; 1 Geo. 1 (1714) st. 2, c. 13.

(*e*) See (as to Quakers and Moravians) the Quakers and Moravians Act, 1833; and (as to Separatists) 3 & 4 Will. 4 (1833) c. 82 (since repealed); also the Quakers and Moravians Act, 1838.

(*f*) Parliamentary Oaths Act, 1866, s. 1.

occupation for a seat in Parliament, who are too numerous for complete statement in this work, we may specify the following :—

(i.) Judges of the superior courts in England (*a*), or Ireland (*b*), or of the Court of Session or Exchequer in Scotland (*c*) ;

(ii.) Judges of the English County Courts (*d*) ;

(iii.) Officers of any court having jurisdiction in bankruptcy in England (*e*) ;

(iv.) Clergy of the Established Church of England, ministers of the Established Church of Scotland, or clergy of the Church of Rome (*f*) ;

(v.) Metropolitan police magistrates (*g*) ;

(vi.) Sheriffs of counties, returning officers of boroughs (*h*), recorders (*i*), and revising barristers (*k*), within their respective jurisdictions ;

(*a*) Com. Journ. 9th Nov. 1605 ; Judicature Act, 1875, s. 5.

(*b*) Supreme Court of Judicature (Ireland) Act, 1877, s. 13.

(*c*) Parliamentary Elections (Scotland) Act, 1733, s. 4.

(*d*) County Courts Act, 1888, s. 8.

(*e*) Bankruptcy Act, 1883, s. 116.

(*f*) House of Commons (Clergy Disqualification) Act, 1801, s. 4 ; Roman Catholic Relief Act, 1829, s. 9 ; Clerical Disabilities Act, 1870. Upon the controverted question as to the eligibility of clergymen prior to the House of Commons (Clergy Disqualification) Act, 1801, Blackstone inclined to the negative, assigning as the reason that the beneficed clergy are represented in *convocation*. But this reason, as

has been justly remarked, is not satisfactory ; and the authorities were on the whole in favour of their eligibility (*Case of the Borough of Newport* (1785) 2 Luder, 269).

(*g*) Metropolitan Police Act, 1829, s. 18 ; 3 & 4 Will. 4 (1833) c. 19, s. 19.

(*h*) Bro. Ab. tit. *Parliament*, 7 ; 4 Inst. 48 ; Whitelocke, *Parl.* chs. 99, 100, 101 ; Com. Journ. 25th June, 1604 ; 14th April, 1614 ; 22nd March, 1620 ; 2nd, 4th, and 15th June, 17th Nov. 1685 ; Rogers, *Elect.* (18th edn.) vol. II. p. 6. As to sheriffs substitute in Scotland, see Sheriffs (Scotland) Act, 1747, s. 11 ; Representation of the People (Scotland) Act, 1832, s. 36.

(*i*) Municipal Corporations Act, 1882, s. 163.

(*k*) Parliamentary Voters Registration Act, 1843, s. 28.

(vii.) Holders of royal pensions, either during pleasure or for a term of years (*a*) ;

(viii.) Contractors with government on account of the public service (*b*). But, as to these, there is an exception in the case of members of an incorporated trading company ; and also a provision, that, where the completion of any contract shall devolve on any person by descent or limitation, will, or marriage, the incapacity shall not attach until twelve calendar months after he shall have become interested in such contract.

(ix.) But by far the most interesting and important of the disqualifications which arise from the holding of office, is that which is established by the statute known as the Succession to the Crown Act, 1707 ; and as this statute has an important influence upon the legal relations at the present day existing between the Crown and Parliament, it may be worth while to devote some little attention to it.

Until the end of the sixteenth century, Crown officials were rarely members of the House of Commons ; but, during the following century, and especially after the Restoration, the practice of Crown officials occupying seats in that House spread with great rapidity. The practice had its good and its bad sides. On the one hand, the presence, in the House, of the trusted advisers of the Crown, undoubtedly made the relations between the Crown and the House more harmonious, and enabled the House, by perfectly legitimate means,

(*a*) Succession to the Crown Act, 1707, s. 24 ; Crown Pensioners Disqualification Act, 1715. See 32 & 33 Vict. (1868), c. 43, s. 17, with regard to the eligibility of persons holding certain *diplomatic* pensions ; and the Pensioners Civil Disabilities Relief Act, 1869, as to

persons who hold *civil service* pensions or *superannuation allowances*.

(*b*) House of Commons (Disqualification) Act, 1801. For a recent enforcement of this statute, see *Samuel's Seat* (1913) 82 L. J. (P. C.) 106.

to acquire a great indirect influence on the policy of the Crown. It is, in fact, an academic question of great interest, whether Charles the First might not have avoided the Civil War and saved his crown, by frankly conferring confidential offices upon Pym, Hampden, and other trusted Parliamentary leaders. But, equally, the practice was open to grave abuse ; for it enabled the Crown, by the aid of the votes in the House of its own subordinate officials, who could be deprived of their offices if they did not obey orders, to swamp the resolutions of independent members.

It was this latter aspect of the practice which was most conspicuous at the end of the seventeenth century ; and, accordingly, we are not surprised to find repeated attempts to check it by legislation. Thus, the famous Act of Settlement (*a*), upon which the present line of the royal dynasty is based, expressly enacted, that “ no person who has an office or place of profit under the King, or receives a pension from the Crown, shall be capable of serving as a member of the House of Commons.” This provision, which was, probably, not intended to take effect until the extinction of the House of Orange, was, in fact, repealed before it ever came into operation, by a clause of the Act of Security (*b*), passed in the year 1705, with a view to meet the dangers of a Jacobite rising. By this time, the inconvenience of excluding all Crown officials from the House had become manifest to practical politicians ; and, in the Act of 1705, the provisions of the Act of Settlement were superseded by a compromise, which, while still formally excluding all Crown officials, allowed the holders of ‘ old ’ offices, *i.e.* offices in existence at the date of the passing of the Act, to stand for re-election, and, if re-elected *after* accepting office, to take their seats.

(*a*) 12 & 13 Will. 3 (1700)  
c. 2.

(*b*) 4 & 5 Ann. c. 20, ss. 25,  
26.

This compromise, which, for obscure reasons, was repealed but re-enacted in the Succession to the Crown Act, 1707 (*a*), was, obviously, based chiefly on the desire to prevent the Government of the day increasing its numerical strength by creating new offices, held by members of the House. It was, probably, worth very little as a security against corruption, until Burke's memorable reforms, in the latter half of the eighteenth century, had swept away a vast accumulation of antient sinecure offices which had, in fact, notwithstanding the Act of 1707, been freely used to corrupt the House of Commons till that time. Then, however, its real value appeared; for it enabled the remaining old offices, which, in fact, are the leading offices in any Ministry (*b*), to be held by members of the House (provided that they can secure re-election after appointment), while it disqualifies entirely the great mass of the 'permanent' officials of the Crown, *i.e.*, the officials who do not frame the policy of the Government, but merely carry it out.

It should be remembered, however, that, by the express provisions of the Act of Security, the exclusion does not apply to officers in the navy or army, nor does the acceptance of new commissions by such persons, nor a change of offices by other holders of 'old' offices (*c*), vacate their seats. Moreover, certain offices commonly treated as Ministerial, *e.g.*, Under-Secretaryships of State and the Financial Secretaryship to the Treasury, are not within the terms of the Succession to the Crown Act; because they are not held 'under the Crown,' but under the chiefs of their respective depart-

(*a*) 6 Ann. c. 41, s. 24.

(*b*) When it has been desired to include a new office (*e.g.*, that of Secretary of State for India) in the Ministry, it has been expressly provided by

the statute creating it that it shall be capable of tenure with a seat in the House of Commons.

(*c*) Representation of the People Act, 1867, s. 52.



ments (a). But not more than four Secretaries of State and four Under-Secretaries may sit in the House of Commons at the same time (b).

3. The third point, regarding elections, is the *method of proceeding therein*; a matter which is regulated by the law of Parliament, and by the statutes which have been from time to time passed on the subject (c). As soon as the Parliament is summoned, the Lord Chancellor, on behalf of the Crown, sends his warrant to the Clerk of the Crown in Chancery; who thereupon issues out writs to the proper returning officer of each county or borough (that is to say, as the general rule, to the sheriff in the case of a county, and to the mayor in the case of an incorporated borough), commanding such officer to proceed in due course to the election (d). The returning officer must, in the case of a county election, within two days after the day on which he receives the writ, and, in the case of a borough election, either on the same day or on the day following that on which he receives the writ, give public notice, at some time between the hours of 9 A.M. and 4 P.M., of the day and place of election, or for the poll if the election is a contested one, and of the time when and place where forms of nomination papers may be obtained (e).

(a) House of Commons (Disqualification) Act, 1741.

(b) Government of India Act, 1858, s. 4.

(c) The principal statute now in force is the Ballot Act, 1872.

(d) The expenses and charges of the returning officer at a parliamentary election, are regulated and controlled by the Parliamentary Elections (Returning Officers) Act, 1875, as amended by the Parliamentary Elections (Returning Officers) Act, 1885. Under

these Acts, the returning officer is entitled to require security to be given by the candidate for the charges which may become payable under the Act. An attempt has been made by the Parliamentary Elections (Returning Officers) Act (1875) Amendment Act, 1886, to control the amount of these expenses, and to provide for the taxation thereof.

(e) Ballot Act, 1872, Sched. I. (2).

The day of election in the case of a county or district borough must not be later than the ninth day, and in the case of other boroughs than the fourth day, after that on which the writ is received ; the place of election must be some convenient room in the town wherein the same is to be held. By the Elections (Hours of Poll) Act, 1885, the hours of polling are now, primarily, from eight o'clock in the forenoon to eight o'clock in the evening, in all cases ; but, by the Extension of Polling Hours Act, 1913, any candidate at a parliamentary election may, by notice in writing to the returning officer, require the poll to commence at seven in the morning, or to be kept open until nine in the afternoon, or both.

A candidate for election is nominated in writing subscribed by two registered electors of the constituency, as proposer and seconder, and by eight other registered electors as assenting to the nomination (*a*) ; and if, at the expiration of one hour after the time appointed for the election, no more candidates stand nominated than there are vacancies to be filled up, those candidates are returned to the Clerk of the Crown in Chancery, as having been duly elected. But if a contest arises, the returning officer must adjourn the election until a future day, on which the poll is taken in due course (*b*).

Up to a comparatively recent period, the poll in a contested election was taken by each voter openly stating at the polling booth the name of the candidate for whom he intended to vote ; but, in the hope of diminishing the temptation to corrupt voting and its attendant evils, an important change was made by the Ballot Act, 1872, which, although passed only for a period of six years (*c*), has been continued by successive Expiring Laws Continuance Acts. By the pro-

(*a*) Ballot Act, 1872, s. 1. districts, see s. 5.

(*b*) *Ibid.* As to the polling (*c*) *Ibid.* s. 33.

visions of the Act, in the case of a poll at an election, the votes are now given *by ballot* (a), that is to say, by each voter handing in a ballot paper previously supplied to him, whereon are inscribed the names of each candidate, against one or more of which, as the case may require, the voter secretly puts a mark, and then places the paper in a closed box (b). This ballot box having been taken charge of and examined by the returning officer, the result of the poll is ascertained by his counting the votes given to each candidate; and he then returns the name of the candidate or candidates, as the case may be, who has or have secured the majority of votes, to the Clerk of the Crown in Chancery (c). In the case of an equality of votes, but not otherwise, the returning officer, if himself a duly registered elector, may give a vote (d).

Such is the course of proceeding for the purpose of a general election upon the summoning of a new Parliament. In the case of a particular vacancy, by death or otherwise, in an existing Parliament, the course as regards the election for the particular place is the same; except that the warrant for the writ is given by the Speaker, acting by order of the House, or, supposing the vacancy to occur during a prorogation or adjournment, by the Speaker without any such order (e).

(a) Ballot Act, 1872, s. 2.

(b) *Ibid.*

(c) *Ibid.* ss. 1, 2, 15-17. It may be here observed, that the system of voting provided by the Ballot Act, 1872, for parliamentary elections is, by the same statute (s. 20) applied also to contested *municipal* elections. And see Part III. of the Municipal Corporations Act, 1882, on which depends the

law regulating municipal elections in England (*Pickering v. James* (1873) L. R. 8 C. P. 489). These provisions of the Act of 1882 have been applied to Ireland by Order in the Council of the Lord Lieutenant under the Local Government (Ireland) Act, 1898, s. 104.

(d) Ballot Act, 1872, s. 2.

(e) Recess Elections Act, 1784; Election of Members

As to the elections for the universities, whether of England, Scotland, or Ireland, to which the provisions of the Ballot Act as to the manner of voting do not apply, it has been provided by the University Elections Act, 1861, and other Acts, that any elector therein shall be at liberty to record his vote without personal attendance at the poll, by means of a *voting paper*, signed by him and delivered on his behalf, to the Vice-Chancellor of the University (*a*), or to his deputy, at one of the appointed polling places (*b*), by some other elector of the same university, previously nominated for that purpose by the elector so voting (*c*). But the polling at any election for any of the Universities is not to continue for more than five days at the most (*d*).

Besides the points hitherto noticed, there are some others which require attention, and which are common to all elections in England or Wales, whether for counties or boroughs, namely, the following :—

1. While no one is competent to vote unless his name appears on the register of electors (*e*), the law does not permit the qualification of any person, who has been so registered, to be questioned at the time of polling (*f*) ; and no inquiry whatever may be made on that occasion relative to the right of any person to vote, except only that the sheriff or other returning officer must, if required on behalf of any candidate

during Recess Act, 1858 ;  
Elections in Recess Act, 1863 ;  
Bankruptcy Act, 1883, s. 33.

(*a*) University Elections  
Acts, 1861 and 1868 ; Representation  
of the People Act,  
1867, s. 41.

(*b*) As to the polling places  
for the Universities of Oxford  
and Cambridge, see Parlia-  
mentary Elections Act, 1853,  
s. 5.

(*c*) See University Elections

Act, 1868.

(*d*) Parliamentary Elec-  
tions Act, 1853, s. 4 ; Repre-  
sentation of the People Act,  
1867, s. 43.

(*e*) Ballot Act, 1872, s. 7.

(*f*) Parliamentary Voters  
Registration Act, 1843, s. 79 ;  
*Pryce v. Belcher* (1846) 3 C. B.  
58 ; (1847) 4 C. B. 866 ;  
*Stowe v. Jolliffe* (1874) L. R.  
9 C. P. 734.

to do so, put to the voter at the time of tendering his vote, and not afterwards, either or both of two questions, worded in the manner prescribed by statute (*a*). The object of these questions is, to ascertain, first, the identity of the proposed voter with the registered person in respect of whose qualification he proposes to vote; and, second, that the proposed voter has not already voted at that election (*b*). The voter may, upon the like requisition, be put to his oath upon these matters (*c*); but no person claiming to vote may be excluded from doing so, unless it appears, upon his answers to the questions, that he is not entitled to vote, or unless he refuses to take the oath (*d*).

2. Though no person can vote unless his name be on the register, yet a person who has been excluded therefrom by the decision of the revising barrister, may nevertheless tender his vote at the election; and the returning officer is bound to enter it in the poll book as having been tendered, distinguishing, however, all votes so claimed from votes admitted. In the event of a petition complaining of an undue election or return, the correctness of the register, as to votes either excluded or admitted, may be impeached before the Judge before whom the trial of the petition is conducted;

(*a*) Parliamentary Voters Registration Act, 1843, s. 81. Analogous regulations are made for the university elections, with reference to objections to *voting papers* (University Elections Act, 1861).

(*b*) *R. v. Thwaites* (1853) 1 El. & Bl. 704; Ballot Act, 1872, Sched. I. (27); Redistribution of Seats Act, 1885, s. 13 (4).

(*c*) Parliamentary Voters Registration Act, 1843, s. 81. By 2 Geo. 2 (1729) c. 24, and

43 Geo. 3 (1803) c. 74, an oath in regard to *bribery* also might be put to the voter; but these enactments have been repealed. (See Corrupt Practices Prevention Act, 1854, Sched. A.; Ballot Act, 1872, Sched. IV.)

(*d*) *R. v. Harris* (1835) 7 Car. & P. 253; *R. v. Dodsworth* (1837) 8 Car. & P. 218; Parliamentary Voters Registration Act, 1843, s. 82; Ballot Act, 1872.

and the vote may be either allowed or rejected on the scrutiny, and the poll altered accordingly (*a*).

3. Moreover, as it is essential to the very being of Parliament that elections should be absolutely free, all undue influences upon the electors are illegal, and strongly prohibited (*b*). It is accordingly provided, that, on every day appointed for the nomination, or for the election, or for taking the poll for the election, of a member to serve in Parliament, no soldier, within two miles of the city, borough, or place where the nomination or election is to be declared, or poll taken, shall be allowed to go out of the barracks or quarters in which he is stationed ; unless for the purpose of mounting or relieving guard, or for giving his vote at such election. And every soldier allowed to go out for any such purpose, within the limits aforesaid, must return to his barracks or quarters with all convenient speed, as soon as his guard shall have been relieved or vote tendered (*c*). It has also been resolved, by vote of the House of Commons, that no Lord of Parliament, or Lord Lieutenant of a county, has any right to interfere in the election of commoners (*d*). Officers of the excise, customs, stamps, and certain other branches of the revenue, as well as justices and officers appointed under the Metropolitan Police Acts, are also expressly prohibited, under heavy pecuniary penalties and loss of

(*a*) Rules made under the Parliamentary Elections Act, 1868, s. 25 ; *Ryder v. Hamilton* (1869) L. R. 4 C. P. 559.

(*b*) The Bill of Rights, 1689.

(*c*) Parliamentary Elections (Soldiers) Act, 1847. The rule formerly was, that, as soon as the time and place for the election were fixed, all soldiers quartered in the place were to remove at least one day before the election to the

distance of two miles or more, and not to return till one day after the poll was ended (8 Geo. 2 (1735) c. 30). But this enactment, being found inconvenient, is now repealed by the statute above cited.

(*d*) As to the legal effect of the sessional order of the House of Commons, see Anson, *Law and Custom of the Constitution* (4th edn.), i. p. 125, n.

office, from any interference (a). Moreover, riots have been frequently held to make an election void ; and by the Reform Act, 1832, it was provided, that where, at any place of election, the proceedings were interrupted by riot, or open violence, the sheriff or other returning officer should adjourn the poll at such place till the following day, and, if necessary, should then further adjourn the same until the interruption should have ceased (b).

But while electors were thus secured against violence at elections, and against other such external interferences with the exercise of the right of voting, they remained open to the internal dangers of what have been called ‘the infamous practices of bribery and ‘corruption.’ It is true that bribery at elections was an offence, even at the common law, and punishable with fine and imprisonment (c) ; but, for the more easy repression of bribery and of other cognate offences, specific provisions have, from time to time, been made. These provisions are, unfortunately, of a somewhat complicated character, depending upon the contents of several Acts of Parliament, of which the most important is, perhaps, the Corrupt Practices Act, 1883. Only a brief summary of them can be given.

The Acts draw an important distinction between *corrupt* practices, which necessarily imply guilty knowledge or intention, and merely *illegal* practices, which may be done without any intention to break the

(a) Metropolitan Police Acts, 1829, s. 18, and 1860, s. 5.

(b) Representation of the People Act, 1832, s. 70.

(c) *R. v. Pitt* (1762) 3 Burr. 1335, 1359. Blackstone says (vol. i. p. 173), that the first instance that occurs of election bribery is as early as

13 Eliz., when one Thomas Longe, being a simple man and of small capacity to serve in Parliament, acknowledged that he had given the corporation by which he was returned 4*l.* ; and for this offence he was removed, and the corporation was fined 20*l.*

law or even to violate morality, through sheer inadvertence or ignorance.

Of the former kind are, of course, the offence of *bribery* (*a*), which consists in the offering or acceptance of reward to influence a vote, whether the offer is made by the candidate or any one else ; also *personation*, or the assumption of a false identity at the poll (*b*), *undue influence* (*c*), which consists in the application of force, physical or moral, or threats or intimidation, with a view to influencing the casting or withholding of a vote, and *treating* (*d*), which seems to be simply a species of bribery, in which the reward offered takes the form of food, drink, or other 'entertainment.' Personation is a felony, and involves liability to imprisonment for two years ; the other corrupt practices are misdemeanors, involving fines or imprisonment for a year (*e*). As regards all of them, the person convicted is excluded from *all* electoral rights, and all capacity for public office, for a period of seven years (*f*).

The latter kind, or merely illegal practices, are such acts as have been found by experience to lead to extravagance, disorder, confusion, and other undesirable features at an election, without necessarily involving any corrupt design on the part of those who take part in them. Such are the expenditure of money in conveying electors to the poll, in hiring land or buildings for advertisements, or in setting up an excessive number of committee rooms (*g*), the making of unwarranted statements as to the withdrawal of rival candidates (*h*), or false statements relative to the personal character or conduct of candidates (*i*),

(*a*) Corrupt Practices Act,  
1854, ss. 2, 3.

(*b*) Ballot Act, 1872, s. 24.

(*c*) Corrupt Practices Act,  
1883, s. 2.

(*d*) *Ibid.* s. 1.

(*e*) *Ibid.* s. 6.

(*f*) *Ibid.*

(*g*) *Ibid.* s. 7 (1).

(*h*) *Ibid.* s. 9 (2).

(*i*) Corrupt Practices Act,  
1895, s. 1.



indulgence in a display of banners, cockades, ribbons, or bands of music (*a*). Persons committing these acts, whether electors or not, during an election, are liable, on summary conviction, to fines not exceeding one hundred pounds for each offence (*b*); and further, if they are electors, are disqualified from voting at the election in question (*c*).

The election being closed, the sheriff or other returning officer returns the writ, with the names of the persons elected by the majority, to the Clerk of the Crown in Chancery, to whom also the poll books are delivered, for their future safe custody (*d*). If the returning officer wilfully delays, neglects, or refuses duly to return any person who ought to be returned, he is liable to an action at the suit of the party aggrieved. But no such action is to be commenced, save within one year after the commission of the injury, or within six months after the conclusion of the trial relating to the election (*e*); and the members returned by the returning officer are the sitting members, unless and until the return is declared false and illegal. And here we may observe, that the Reform Act of 1832 provides, that a returning officer, or any other person wilfully contravening its provisions, shall be liable to be sued by the party aggrieved thereby; and that in the action the jury may find a verdict for such sum as they shall think just, to the extent of 500*l.* (*f*).

(*a*) Corrupt Practices Act, 1883, s. 16.

(*b*) *Ibid.* s. 21 (1).

(*c*) *Ibid.* s. 36.

(*d*) Parliamentary Voters Registration Act, 1843, s. 93.

(*e*) Parliamentary Elections Act, 1868, s. 48.

(*f*) Representation of the People Act, 1832, s. 76. By the Parliamentary Voters Registration Act, 1843, s. 97, a similar action, with damages to the extent of 100*l.*, is given for the wilful breach of the provisions of that Act by

The form and manner of proceeding to impugn the return of a member, are regulated by the Parliamentary Elections Act, 1868 (*a*), with the amending Act of 1879 (*b*), and by the Corrupt and Illegal Practices Prevention Act, 1883, and are in substance as follows.

Any person who voted, or had a right to vote, at the election, or who claims to have had a right to be returned or to have been elected, or alleges himself to have been a candidate thereat, may, within the period of twenty-one days after the return, or, in case of an alleged corrupt practice, within twenty-eight days, or, in case of an illegal practice, within fourteen days, after the date of the alleged corrupt or illegal practice, subscribe a petition, complaining of an undue return or election (*c*); which petition must thereupon be served by the petitioner on the respondent, that is to say, on the candidate or candidates who have been returned (*d*). The petitioner must give security, to the amount of one thousand pounds, for the payment of all costs, charges, and expenses (*e*). The petition is then heard and discussed, much as the trial of an ordinary civil case, before two Judges of the High Court, sitting *de die in diem*, in open court without a jury, and with witnesses examined on oath, and, as a general rule, in the borough or county the election for which has been impugned (*f*). But the Director of Public Prose-

returning officers and other officials. (See *Pryce v. Belcher* (1846) 3 C. B. 58; (1847) 4 C. B. 866; Ballot Act, 1872, s. 11.)

(*a*) *Pease v. Norwood* (1869) L. R. 4 C. P. 235; *Waygood v. James*, *ibid.* 361; *Stevens v. Tillet* (1870) L. R. 6 C. P. 147.

(*b*) 42 & 43 Vict. c. 75.

(*c*) Parliamentary Elections Act, 1868, s. 6; Corrupt and

Illegal Practices Act, 1883, s. 40.

(*d*) Parliamentary Elections Act, 1868, s. 8.

(*e*) *Ibid.* s. 6 (5); *Hill v. Peel* (1870) L. R. 5 C. P. 172; *Hughes v. Meyrick*, *ibid.* 407. As to costs, see Corrupt Practices Act, 1883, s. 44.

(*f*) Parliamentary Elections Act, 1868, s. 11; Corrupt Practices Act, 1879; Corrupt

cutions must, by himself or by his deputy, attend the trial (*a*).

At the conclusion of the trial, the Judges determine whether the member whose return or election is complained of, or any or what other person, was duly returned or elected, or whether the election was void ; and they certify the same in writing to the Speaker. The determination of the Judges is final to all intents and purposes ; and on receiving the Judges' certificate, the House itself gives directions as to confirming or altering the return, or issuing a writ for a new election, as circumstances may require (*b*). But if it appears to the Judges trying the petition that any questions of law, as to the admissibility of evidence or otherwise, require further consideration by the Court, it is lawful for them to postpone the grant of their certificate until the Court has determined such questions (*c*). Also, where any charge is made in the petition of any corrupt or illegal practice, the Judges are required to certify as to the same, or to make any special report which the occasion may require (*d*) ; in the latter case, the House of Commons may make such order in respect of any such special report as it shall think proper (*e*). And, on a report by the Judges that any corrupt or illegal practice has been committed,

Practices Act, 1883, s. 42. The Judges are directed, on or before the third day of Michaelmas Term, in every year, to select, by a majority of votes, certain of their number to be placed on a rota for the trial of election petitions during the ensuing year.

(*a*) Corrupt and Illegal Practices Act, 1883, s. 43 ; Prosecution of Offences Act, 1884, s. 2.

(*b*) Parliamentary Elections

Act, 1868, s. 13.

(*c*) *Ibid.* s. 12.

(*d*) *Ibid.* s. 11 (14). With regard to the *witnesses* at the trial of the petition, it may be noticed that under this Act they are entitled not only to their reasonable expenses, but also to an *indemnity* (s. 34). And see Corrupt and Illegal Practices Prevention Act, 1883, s. 59.

(*e*) Parliamentary Elections Act, 1868, s. 14.

either by a candidate personally, or through an agent with his knowledge and consent, or by any other person, the guilty party is subject to such incapacities, penalties, and disqualifications, as have been already mentioned (a). Where it is represented to His Majesty, by a joint address of both Houses of Parliament, that there is reason to believe, or that an election court has reported to the Speaker, that corrupt or illegal practices have extensively prevailed in any county, borough, or other place sending a member or members to Parliament, His Majesty may appoint commissioners to make inquiry into these alleged practices; and it has been the practice of the legislature, where the report of such commissioners has been unfavourable, to deprive the constituency in question, either permanently or for a time, of its right to send members to Parliament (b).

When a member is once duly elected, and has been duly sworn, or has duly affirmed (c), he is compellable to discharge the duties of the public trust thus conferred upon him, and is bound to be present at every 'call' of the House, unless he can show a sufficient excuse for his non-attendance; but as there has been no call of the House since 1836, it may be considered that this method of enforcing attendance is now obsolete, though it seems that non-attendance may

(a) See *ante*, p. 513. By 34 & 35 Vict. (1871) c. 77, several persons who had been reported to the House as having been guilty of bribery at an election for a certain borough, were by name individually prohibited from voting *at any time* at any parliamentary election for that borough.

(b) This course has been taken with regard to several boroughs: see, *e.g.*, the case of Worcester (Hansard, 1906,

vol. clxvii. p. 1051). As to the practice pursued at such inquiries, see *Fitzgerald's Case* (1869) L. R. 5 Q. B. 1; 5 Ex. 21. And as to certificates of indemnity given to witnesses by the commissioners, see the Corrupt Practices Act, 1883, s. 59; *R. v. Hulme* (1870) L. R. 5 Q. B. 377; *R. v. Price* (1871) L. R. 6 Q. B. 411.

(c) See *ante*, p. 501.

be treated as a contempt and punished accordingly (a). Nor is a member entitled by law to resign his seat ; but it has long been usual for the Crown to bestow on any member wishing to vacate his seat the stewardship of the Chiltern Hundreds, or of one of the royal manors of East Hendred, Northstead, or Hempholme ; the appointment to which offices, though merely nominal, is, through the operation of the Succession to the Crown Act, 1707 (b), sufficient for the purpose of vacating the seat.

This practice is believed to have begun, as regards the manors, not earlier than about the year 1740, and as regards the Chiltern Hundreds not till 1751. It has been suggested (c) that it would be difficult, from the form of appointment to the Chiltern Hundreds, to show that it is an ' office of profit under the Crown ' (d) ; but the form of appointment to the Manor of Northstead clearly alludes to the stewardship as an office (e).

This summary of the law of parliamentary elections concludes our inquiries into the laws and customs more peculiarly relating to the House of Commons.

VI. [We proceed now to consider the method of making laws ; and this is much the same in both Houses.

But first it must be premised, that, for despatch of business, each House of Parliament has its *Speaker*. The Speaker of the House of Lords—whose office it is to preside there, and to manage the formalities of business—is, by prescription, the Lord Chancellor, or Keeper of the Great Seal, or any other appointed by royal commission ; and he need not necessarily be a peer. If none be so appointed, the House of Lords may, it is

(a) Hansard, 1860, vol. clvi. pp. 1931, 2213.

(b) See *ante*, pp. 504–506.

(c) 2 Hatsell, 41.

(d) See May, *Parl. Practice*, (11th edn.) p. 643.

(e) Anson, *Law and Custom* (4th edn.), vol. i. p. 95.

[said, elect. The Speaker of the House of Commons is one of its members chosen by the House (a) ; but his title to the office is not complete until he has been approved by the Crown (b). And herein the usage of the two Houses differs, that the Speaker of the House of Commons cannot give his opinion or argue any question in the House except when the House has resolved itself into committee (c) ; but the Speaker of the House of Lords, if a Lord of Parliament, may do so.] On the other hand, the powers of the Speaker of the House of Commons, with regard to the control of debate and maintenance of order in the House are far greater than those of the Speaker of the House of Lords, who is rather the official than the president of that House. It is, indeed, doubtful whether he can exercise any disciplinary powers. And it is a curious fact, that the office of Speaker of the House of Lords may be held by a commoner ; the woolsack, on which he sits, not being, technically, within the limits of the House.

[In each House, the act of the majority binds the minority ; and this majority is declared by votes, openly and publicly given, not privately or by ballot.] In the House of Commons, the Speaker never votes, except when the votes of the House are otherwise

(a) Com. Dig. *Parl.* E. 5. As to his salary, &c., see House of Commons (Speaker) Act, 1832 ; House of Commons (Officers) Act, 1834. As to the Deputy Speaker, see Deputy Speaker Act, 1855. Since 1902 the Standing Orders of the Commons have provided for the appointment of a Deputy Chairman, who, in the absence of the Chairman of Ways and Means, has all the powers of the Chair-

man, including those belonging to the Chairman as Deputy Speaker.

(b) Sir Edward Coke, upon being elected Speaker in 1592, in his address to the throne, declared, "this is only as "yet a nomination, and "no election, until your "majesty giveth allowance "and approbation" (2 Hats. 164).

(c) *Vide post*, p. 523.

equal ; in which latter case, he has a casting vote (*a*). But the Speaker of the House of Lords (if a member) has his vote counted with the rest of the House ; and, in the case of an equality of votes there, the negative opinion prevails (*b*).

[To introduce a Bill in either House, if the relief sought by it is of a private nature, it is first necessary to prefer a petition ; which petition must be presented by a member, and usually sets forth the grievance desired to be remedied. The petition, when founded on facts that may be in their nature disputed, used to be referred to a committee of members, who examined the matter alleged, and reported it to the House (*c*), or, in the event of the petition being presented to the House of Lords, to two of the judges, to examine and report the state of facts alleged, to see that all necessary parties consented, and to settle all points of technical propriety.] But this duty is now discharged by means of certain officers called Examiners, appointed, in the case of the House of Lords, by the House itself, and, in the case of the House of Commons, by the Speaker. And then, whether or not the Examiner has reported that the Standing Orders have been complied with, the petition is presented to the House, which, if the report is favourable, gives permission for the Bill based upon it to be read a first time, and, if the report is unfavourable, either refuses leave, or refers it to the Standing Orders Committee, to see whether the Standing Orders may be dispensed with in the particular case. In public matters, a Bill originating in the Commons is brought in upon motion made to the House to obtain leave for that purpose ; and no petition is required. But there are many Standing Orders relative to the

(*a*) May, *Parl. Practice* (11th edn.) p. 364.

(*b*) 14 Lords' J. (1689) 168 ;  
33 Lords' J. (1773) 519.

(*c*) Com. Dig. *Parl. G.* 11 ;  
Witnesses on Petitions Act,  
1801.

introduction of Bills, and more especially of Private Bills, which are of too minute a nature to be detailed in this place (*a*).

[Formerly all Bills were drawn in the form of petitions to the Crown (*b*), which were entered upon the Parliament Rolls, with the King's answer thereunto subjoined, not in any settled form of words, but as the circumstances of the case required (*c*). Then, at the end of each Parliament, the judges drew them up in the form of a statute, which was entered on the Statute Roll. But the Commons, with some reason, complained that this process deprived them of the means of knowing the exact terms of a measure before it was too late to protest; and, in consequence, in the reign of Henry the Sixth, Bills in the form of Acts, according to the modern custom, began to be introduced.] The style now used in an Act of Parliament is as follows:—  
“Be it enacted by the King's Most Excellent Majesty,  
“by and with the advice and consent of the Lords

(*a*) See Parliamentary Documents Deposit Act, 1837, as to the deposit of plans and documents in the case of private bills; Preliminary Inquiries Act, 1851, as to the preliminary inquiries to be made on all applications for local Acts affecting navigation; House of Commons Costs Taxation Acts, 1847 and 1879, House of Lords Costs Taxation Act, 1849, Parliamentary Costs Act, 1865, and Parliamentary Costs Act, 1871, as to costs on private bills; and Parliamentary Witnesses Oaths Act, 1871, as to the power of committees of the House to administer oaths to witnesses.

(*b*) The Commons, for

nearly two centuries, continued the style of very humble petitioners. Their petitions frequently began with “Your poor commons beg and pray,” and concluded with “for God's sake, and as an act of charity”; — “*Vos poveres communes prient et supplient, pur Dieu et en œuvre de charité*” (Rot. Parl. *passim*).

(*c*) See, among numberless other instances, the *Articuli Cleri*, 9 Edw. 2 (1315). As to the antient form of our statutes, much information will be found in Reeves' *Hist. Eng. Law* (ed. Finlason), vol. i. p. 250; vol. ii. pp. 514, 656.



“Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same” (a). But in measures passed under the special provisions of the Parliament Act, 1911, previously described (b), there is a special form of preamble, which omits all reference to the Lords, and states that the measure in question has been passed in accordance with the provisions of the Act (c).

Supposing the Bill to begin in the House of Commons and to be of a public nature, the persons directed to bring in the Bill present it to the House, either drawn out in a proper form or else in ‘dummy’ (d). The Bill is then read a first time and ordered to be printed; leave to introduce being usually granted as of course, though instances of opposition are not unknown. When leave to introduce has been given, the first reading follows without debate; but, where a Bill has been introduced in ‘dummy,’ the full text of the Bill must be handed to the proper officials of the House in time to allow it to be printed before the date fixed for the

(a) Money Bills have a special preamble before the enacting words. (See the Appropriation Act of any year.)

(b) See *ante*, pp. 476–477.

(c) Parliament Act, 1911, s. 4.

(d) See Interpretation Act, 1889, which, together with other provisions, repeals and re-enacts the provisions of 13 & 14 Vict. (1850) c. 21 (often called Lord Brougham’s Act) as to shortening the language used in Acts of Parliament. We may also notice here, that, in order to avoid the necessity of repeating in many different Acts (more

especially private Acts) the various provisions usually introduced into such as authorise the execution of undertakings of a public nature by local authorities, companies, and others, and also in order to secure uniformity, those provisions are now consolidated in divers general Acts; and into any subsequent statute passed with reference to such undertakings, one or more of such ‘Consolidation Acts,’ or certain of their clauses (as the case may require), are incorporated by reference. (See Ilbert, *Legislative Methods and Forms*, ch. xi.)

[second reading. After a convenient interval, the Bill is read a second time ; and, after such reading, the Speaker puts the question whether it shall proceed any further. If the vote of the House is in the affirmative, the Bill is *committed*, that is, referred to a committee ; which is either selected by the House for the occasion, or is one of the standing committees, or consists of the whole House. In order to form a committee of the whole House, the Speaker quits his chair ; and the chair at the table of the House is taken by the Chairman, or one of the Deputy Chairmen, of Committees. The Speaker is then free to sit and debate as a private member. In these committees, the Bill is debated clause by clause, amendments are made, and blanks are filled in ; and sometimes the Bill is entirely new-modelled. After it has gone through committee, the Chairman reports it to the House, with such amendments as the committee may have made. The House next, either forthwith or on some later date, reconsiders the whole Bill once more ; first dealing with any new proposed clauses, and then considering any amendments proposed to the Bill as amended in committee. But it must be observed that a Bill is not required to pass through this particular stage, technically known as the ‘report stage’ ; unless it has been amended in committee.

When the House has dealt with all the new clauses and amendments proposed, the Bill is ordered to be reprinted (a). It is then read a third time ; at which stage amendments (but only of a purely verbal nature) are also sometimes made to it, and new clauses added. The Speaker then again opens the contents,

(a) 105 Com. Journ. (1850) 372. At this stage of the proceedings, the former practice was to *engross* the bill on one or more pieces of parch-

ment ; but this engrossing was discontinued in 1849 (104 Com. Journ. (1849) 52).

[and, holding it up in his hands, puts the question whether the Bill shall pass.] If this is agreed to, the title of the Act is next settled ; and the title used to be a general one for all the Acts passed in the session, till, in the time of Henry the Eighth, distinct titles were introduced for each chapter (*a*). After this, the Bill is printed fair by the King's Printer ; and one of the members is directed to carry it to the Lords, and to desire their concurrence. The member thus deputed, attended by several more, carries it to the bar of the House of Lords, and there delivers it to their Speaker.

In the House of Lords, the Bill then passes through the same forms as in the House of Commons. If it is rejected, no more notice is taken ; but the matter passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the Lords send a message, which upon matters of high dignity and importance used to be conveyed by two of the Judges, that they have agreed to the same ; and the Bill (not being a Money Bill) remains with the Lords, if they have made no amendment to it. But if any amendments are made, such amendments are sent down with the Bill, to receive the concurrence of the Commons. And if the Commons disagree with the amendments, a conference sometimes follows between members deputed from each House ; or else the Commons may appoint a committee to draw up the reasons for disagreeing with the Lords' amendments. The Houses, for the most part, settle and adjust the differences ; but if both remain inflexible, the Bill is dropped for the time being ; though it may, of course, now be sent up again under the pro-

(*a*) It is said that this custom first began in the fifth year of Henry the Eighth (Reeves' *Hist. Eng. Law*, vol.

iv. p. 412). As to the relation of the title to the Act, see *ante*, vol. i. p. 41.

visions of the Parliament Act, 1911, previously described (a). Should such action be contemplated, the Commons will be careful about admitting any amendments by the Lords ; for it is necessary, by the terms of the Parliament Act, that the Bill sent up in successive sessions, shall be the *same* Bill. That Act, however, provides for the case in which the Commons are prepared to compromise, by enacting (b) that amendments made by the Lords (either of their own motion or on the suggestion of the Commons) and accepted by the Commons, shall not be deemed alterations in the Bill. Purely formal alterations, necessitated by the lapse of time, may be made by the Commons during the passage of a measure ; without jeopardising the progress of the Bill under the Parliament Act (c).

When the Houses are agreed on a measure, other than a Money Bill, it is lodged as above mentioned at the House of Lords, until a convenient opportunity occurs of presenting it to His Majesty for his royal assent. But a Money Bill, and, presumably, a Bill passed under the provisions of the Parliament Act, 1911, remain in the custody of the House of Commons until presented for the royal assent (d).

It will, of course, be understood, that legislation may, and frequently does, originate in the House of Lords ; in which case similar forms are observed, *mutatis mutandis*, as in the case of measures which begin in the Commons' House. But no leave to introduce a Bill is required by any peer of Parliament (e) ; and in the details of the progress of a measure, there

(a) See *ante*, pp. 476-477.

(b) S. 2 (4).

(c) *Ibid.*

(d) Com. Journ. 24th July, 1660. When an Act of Grace or Pardon is passed, it is first signed by the King, and

then read once only in each of the Houses without any amendment (D'Ewes' Journ. 20, 73 ; Com. Journ. 17th June, 1747).

(e) May, *Parl. Practice* (11th edn.) p. 461.

are many minor differences between the procedures of the two Houses.

[The royal assent to a Bill may be given either in person or by commission. Where it is given in person, the King comes to the House of Lords, and, sending for the Commons to the bar, the titles of all the Bills that have passed both Houses are read; and the King's answer is declared by the Clerk of the Parliament in Norman-French. If the King consents to a Public Bill, the Clerk usually declares "*le roy (or la reyne) le veult*"; if to a Private Bill, "*soit fait comme il est désiré*." But when a Money Bill is passed, the royal assent is thus expressed: "*le roy (or la reyne) remercie ses bons subjects, accepte leur benevolence, et ainsi le veult*." If the King refuses his assent, it is in the gentle language of "*le roy (or la reyne) s'avisera*" (a). But the royal assent may be given by commission; by virtue of the statute 33 Hen. 8 (1542) c. 21, which enabled the King to give his assent by letters patent under his Great Seal, signed with his hand, and notified in his absence to both Houses assembled together in the higher House. When the Bill has received the royal assent in either of these ways, it is then, and not before, a statute or Act of Parliament (b);] and by the Acts of Parliament (Commencement) Act, 1793, the Clerk of Parliament is directed to indorse on every Act, immediately after the title thereof, the day, month, and year when the same passed, and received the royal assent. Such indorsement is part of the Act, and is now the date of the commencement of the Act, where no other

(a) The words *le roi s'avisera* correspond to the phrase formerly used by courts of justice, when they required time to consider of their judgment, viz., *curia advisari vult*. And there can

be little doubt but originally the phrase implied a serious intent on the part of the monarch, to take the subject into consideration.

(b) *R. v. Justices of Middlesex* (1831) 2 B. & Ad. 818.

time for its commencement is prescribed by the Act itself (*a*).

[The statute or Act is then placed among the records of the kingdom ; there needing no formal promulgation of it to give it the force of a law, as was necessary by the civil law with regard to the Emperor's edicts, because every man in England is, in judgment of law, party to the making of an Act of Parliament, being present thereat by his representatives. However, the King's Printer is bound, by virtue of his office, to print each Act for the information of the whole land (*b*).

An Act of Parliament thus made is the exercise of the highest authority that this kingdom acknowledges upon earth. It binds every subject in the land, and the dominions thereunto belonging—nay, even the King himself, if particularly named therein. It cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms, and by the same authority of Parliament ; it being a maxim of the law, that it requires the same strength to dissolve as to create an obligation. It was indeed formerly held, that the King might in some cases dispense with penal statutes (*c*) ; but by the Bill of Rights of 1689, it was declared that the power of suspending or dispensing with laws, by regal authority without consent of

(*a*) As to the law with respect to the time when a statute begins to operate, see also *ante*, vol. i. pp. 39–40.

(*b*) 104 Com. Journ. (1849) 52. Public statutes (as to which see *ante*, vol. i. p. 38) need no proof in courts of justice, being judicially noticed ; as are now also private Acts passed since 1850, unless the contrary is expressly provided. (*Ibid.*) By the Evidence Act, 1845, ss. 3,

4, all copies of private Acts, and of the Journals of either House, if purporting to be printed by the printers to the Crown, or to either House of Parliament, are admitted as evidence thereof ; and by the Documentary Evidence Act, 1882, s. 2, if purporting to be printed under the superintendence or authority of His Majesty's Stationery Office.

(*c*) Finch, L. 82, 234 ; Bacon, *Elem.* ch. 19.

[Parliament, 'as it hath been assumed and exercised 'of late,' was altogether illegal. Such suspension or dispensation on the part of the Crown therefore now requires an Act of Parliament enabling the Crown in that behalf (a).

On the other hand, it must not be forgotten, that any attempt, in an Act of Parliament, to bind the hands of future Parliaments, will be of no legal force. For the same sovereign power which enacted the restraining statute will reside in the Parliament which proposes to alter or repeal it ; and, consequently, the enactments of that later Parliament will be equally binding with those of the earlier.

VII. There remains only, in the seventh and last place, to add a word or two concerning the manner in which Parliaments may be adjourned, prorogued or dissolved.

An *adjournment* is no more than a continuance of the session from one day to another ; as the word itself signifies. This is done by the authority of each House separately every day ; and sometimes for a fortnight or a month together, as at Christmas or Easter, or upon other particular occasions. But the adjournment of one House is no adjournment of the other (b). It hath also been usual, when His Majesty hath signified his pleasure that both or either of the Houses should adjourn themselves to a certain day, to obey the royal pleasure so signified, and to adjourn accordingly (c). Otherwise, besides the indecorum of a refusal, a prorogation would assuredly follow ; which would often be very inconvenient both to public and private business. For a prorogation puts an end to

(a) *E.g.*, the Remission of Penalties Act, 1875, enables the Crown to dispense with the penalties under the Sunday Observance Act, 1780.

(b) 4 Inst. 28.

(c) Com. Journ., *passim* ; *e.g.*, 11th June, 1572 ; 21st May, 1768.

[the session; and then such Bills as are only begun and not perfected, must be resumed *de novo* (if at all) in a subsequent session. Whereas, after an adjournment, all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement.

A *prorogation* is the continuance of the Parliament from one session to another, as an adjournment is a continuation of the session from day to day; and a prorogation is by the royal authority alone, usually expressed by the Lord Chancellor, in the presence of, or by commission from, the Crown, or else by Proclamation.] By the Prorogation Act, 1867, such last mode of announcing the royal intention is expressly made sufficient notice thereof; provided the day of prorogation be some day not less than fourteen days from the day for which Parliament then stood summoned or prorogued. But this Act applies only to extensions of the period of a prorogation, and not to the prorogation at the end of a session.

[Both Houses are necessarily prorogued at the same time; the prorogation not being of the House of Lords, or Commons, but of the Parliament. And the session is never understood to be at an end until a prorogation; though, unless some Act were passed or some judgment given in Parliament, it would in truth be no session at all (a). Formerly the usage was, for the King from time to time to give the royal assent to all such Bills as he approved, and then to prorogue the Parliament, though sometimes only for a day or two, and thus end the session (b); which custom obtained so strongly, that it was at one time made a question whether giving the royal assent to a single Bill did not, as of course, put an end to the session (c). And, though it was then re-

(a) 4 Inst. 28; *Hale*, Parl. 1553.

38.

(b) Com. Journ. 21st Oct.

(c) *Ibid.* 21st Nov. 1554.



[solved in the negative, yet the notion was so deeply rooted, that the statute 1 Car. 1. (1625) c. 7, was passed to declare, that the King's assent to that and some other Acts should not put an end to the session. And even afterwards, in the reign of Charles the Second, we find a proviso tacked to the first Bill then enacted, that His Majesty's assent thereto should not determine the session of Parliament (*a*). But it now seems to be allowed, that a prorogation must be expressly made, in order to determine the session.]

The prorogation is to a day fixed ; but by the joint effect of the Meeting of Parliament Acts, 1797, 1799, and 1870, the Crown may now by Proclamation at any time, without regard to the period to which Parliament may stand prorogued or adjourned, appoint it to re-assemble for dispatch of business at the expiration of six days from the date of the Proclamation.

[A *dissolution* is the civil death of the Parliament ; and this may be effected in three ways (*b*).

1. A Parliament may be dissolved by the King's will, expressed either in person or by representation. For, as he has the sole right of convening the Parliament, so also it is a branch of the royal prerogative, that he may, whenever he pleases, either prorogue the Parliament for a time, or put a final period to its existence. If none but itself had a right to prorogue or dissolve a Parliament, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive power ; as was fatally experienced by the unfortunate King Charles the First, who, having unadvisedly passed an Act to continue the Parliament then in being to such time as it should please to dissolve itself, at last fell a sacrifice to that power which he himself had consented to give it.

(*a*) See, for example, 22 & 23 Car. 2 (1670) c. 1.      (*b*) Com. Dig. *Parl.* P. 1, 2.

[2. Until recently it was the rule, that any Parliament in being was dissolved by the demise of the Crown. And, by the common law, this dissolution happened immediately upon the death of the reigning monarch ; for he being considered in law as the head of the Parliament (*caput, principium, et finis*), that failing, the whole body was held to be extinct (*a*). But the calling a new Parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no Parliament in being, in case of a disputed succession, it was provided by an Act of 1696 (*b*), that the Parliament in being should continue for six months, but no longer, after the demise of the Crown, unless sooner prorogued or dissolved by the successor ; and that, if it were at the time of such demise separated by adjournment or prorogation, it should re-assemble immediately.]

The law on this subject, however, is now regulated by the Representation of the People Act, 1867 (*c*), which enacts, that the Parliament in being at any future demise of the Crown shall not be determined or dissolved by such demise, but shall continue so long as it would have continued but for such demise, unless it shall be sooner prorogued or dissolved by the Crown.

It is also enacted, by the Meeting of Parliament Act, 1797 (*d*), that, in case of a demise of the Crown between a dissolution and the day appointed by the writs of summons for the meeting of a new Parliament, the

(*a*) Accordingly, offices held under the Crown, were formerly, in general, vacated by the demise of the Crown (*Bac. Ab. Courts* (C.) ) ; but now, by virtue of the Demise of the Crown Act, 1901, the holding of any office under the Crown is not affected by the demise

of the Crown. As to the commissions of the judges, see *post*, ch. vi. pp. 591–592.

(*b*) 7 & 8 Will. 3, c. 15, repealed by Statute Law Revision Act, 1867.

(*c*) S. 51.

(*d*) Ss. 3, 4, and 5.

last preceding Parliament shall immediately convene for six months, unless sooner prorogued or dissolved by the succeeding monarch ; and that, in the event of a demise on or after the day appointed for assembling the new Parliament, but before it has in fact assembled, then the new Parliament shall in like manner convene for six months, unless sooner prorogued or dissolved.

3. [Originally the duration of Parliament was limited only by the pleasure or death of the King ; but more than two centuries ago legislation interfered, and now a Parliament may be dissolved or expire by length of time. For if either the legislative body were perpetual, or might last for the life of the prince who convened it, as formerly, then, if it were once corrupted, the evil would be past all remedy ; but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly, also, which is sure to be separated again, whereby its members will themselves become private men, and subject to the laws which they have themselves enacted, will think itself bound, in interest as well as in duty, to make only such laws as are good. The utmost extent of time that the same Parliament was allowed to sit was, by the Triennial Act, 1694, three years ; after the expiration of which, reckoning from the day of meeting appointed by the writ of summons, the Parliament was to have no longer continuance. But the Septennial Act, 1715, in order, professedly, to prevent the great and continued expenses of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government, then just recovering from the late rebellion, prolonged this term to seven years ; and, what alone is an instance of the vast authority of Parliament, the very same House that was chosen for three years, enacted its own continuance for seven. Finally, by the terms of the

[Parliament Act, 1911 (*a*), the maximum duration of Parliament is now fixed at five years. So that, as our constitution now stands, the Parliament must expire, or die a natural death, at the end of every fifth year, if not sooner dissolved by the Crown (*b*).]

(*a*) §. 7.

(*b*) The House of Lords, however, in its judicial capacity as a Court of Appeal, sits notwithstanding any prorogation (Appellate Jurisdiction Act,

1876, s. 8); and may, by authority of the Crown under the sign-manual, sit even during a dissolution (*Ibid.* s. 9). And see the Appellate Jurisdiction Act, 1887, s. 1.

## CHAPTER II.

OF THE MONARCH, IN HIS GENERAL RELATION TO THE  
PEOPLE ; AND HEREIN, OF THE LAW OF SUBJECT  
AND ALIEN.

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THE supreme executive power of the United Kingdom of Great Britain and Ireland and its dependencies is vested by our laws in a single person, the King or Queen, under such style and title as are appointed by royal proclamation under the Great Seal of the United Kingdom (*a*) ; and it matters not to which sex the Crown descends, the persons entitled thereto, whether male or female, being immediately invested with all the ensigns, rights, and prerogatives of royal power, as was declared by the 1 Mar. st. 3 (1554) c. 1. For the better understanding of the law and laws relating to this supreme executive power, we shall consider the monarch—

First, with regard to his people in general ;

Second, with regard to his title ;

Third, with regard to his family ;

Fourth, with regard to his councils ;

Fifth, with regard to his prerogative ;

Sixth, with regard to his revenue ; and

Seventh, with regard to his forces.

First, with regard to the relation which subsists

(*a*) See the Union with Ireland Act, 1800 ; the Royal Titles Acts, 1876 and 1901. The present style and title adopted by the King is, “ George V. by the Grace of

God of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.”

between the monarch and his people.—[The principal duty of the King is to govern his people *according to law*. “The King,” saith Bracton, “ought not to be “subject to man, but to God, and to the law ; for the “law maketh the King. And he is not truly King “where will and pleasure rule, and not the law ” (a). Fortescue also lays it down as a principle, that “the, “King of England must rule his people according to “the laws thereof ; being bound, by an oath at his “coronation, to the observance and keeping of such “laws ” (b). And these provisions of the common law have been embodied and declared by the Act of Settlement, 1700, in the words following, namely :—“that “the laws of England are the birthright of the people “thereof ; and all the kings and queens who shall “ascend the throne of this realm ought to administer “the government of the same according to the said “laws ; and all their officers and ministers ought to “serve them respectively according to the same ; and “therefore all the laws and statutes of this realm, for “securing the established religion, and the rights and “liberties of the people thereof, and all other laws and “statutes of the same now in force, are ratified and confirmed accordingly.” To the like effect is the oath, which, by the Act for Establishing the Coronation Oath, 1688 (c), is administered at the coronation to every king and queen succeeding to the imperial crown of these realms, by one of the archbishops or bishops of the realm, in the presence of the people in the following manner :—“*The archbishop or bishop shall say*—‘ Will “‘you solemnly promise and swear to govern the people “‘of this kingdom of England, and the dominions

(a) L. 1, cap. 8 ; l. 2, cap. 16, s. 3.

(b) C. 9, and c. 34. And compare Justinian's Institutes, 2, 17, 8, recording the opinion of the Emperors

Severus and Antoninus,—  
“*Licet enim legibus soluti  
“sumus, attamen legibus vivi-  
“mus.*”

(c) Confirmed by the Act of Settlement (1700) s. 2.

[“ ‘thereunto belonging, according to the statutes in  
 “ ‘Parliament agreed on, and the respective laws and  
 “ ‘customs of the same?’ *The king or queen shall say—*  
 “ ‘I solemnly promise so to do.’ *Archbishop or bishop—*  
 “ ‘Will you to your power cause law and justice in  
 “ ‘mercy to be executed in all your judgments?’ *King*  
 “ *or queen—*‘I will.’ *Archbishop or bishop—*‘Will you  
 “ ‘to the utmost of your power maintain the laws of  
 “ ‘God, the true profession of the Gospel, and the  
 “ ‘Protestant reformed religion established by law?  
 “ ‘. . . And will you preserve unto the bishops and  
 “ ‘clergy of this realm, and to the churches there  
 “ ‘committed to their charge, all such rights and  
 “ ‘privileges as by law do or shall appertain unto them,  
 “ ‘or any of them?’ *King or queen—*‘All this I promise  
 “ ‘to do.’ *After this the king or queen, laying his or*  
 “ *her hand upon the Holy Gospels, shall say—*‘The  
 “ ‘things which I have here before promised I will  
 “ ‘perform and keep; so help me God.’ *Then the king*  
 “ *or queen shall kiss the book.*”

The coronation oath expresses, it is to be observed, all the duties that a monarch can owe to his people: viz. to govern according to law; to execute judgment in mercy; and to maintain the established religion. With regard to the first of these, enough has been said; with regard to the second, which involves both the humanity of our laws and the exercise of the prerogative of mercy, more will be said hereafter in the course of these Commentaries; but with regard to the third, namely, the maintenance of the established religion, it is convenient here to remark that the maintenance of the established religion is also provided for by statute as follows.

By the Bill of Rights of 1689, and the Act of Settlement of 1700, every king and queen regnant of the age of twelve years, either at their coronation, or on the first day of the first parliament, whichever event shall first happen, upon the throne in the House of Lords, was

[required to repeat and subscribe the declaration against Popery, according to the 30 Car. 2 st. 2 (1679) (a); and this provision was confirmed, and extended to the line of Hanover, by the Act of Settlement of 1700 (b).] The object of the declaration referred to was to ensure the maintenance of the Protestant religion as that of the throne and the Established Church of England; and provisions having a similar object were inserted in the Acts of Union with Scotland and Ireland respectively (c). But the form of declaration prescribed by the statute of Charles the Second was needlessly offensive to the feelings of the Roman Catholic subjects of the Crown; and savoured rather of the prejudices of an era of strife, than of the humaner and more tolerant attitude of a civilised age. Moreover, as time went on, and all suspicions of disloyalty on the part of such Roman Catholic subjects entirely disappeared (many of them being, indeed, conspicuous for their loyalty and devotion to the Crown), it became increasingly intolerable, that the joyous solemnity of a coronation should be made the occasion of insulting a numerous and honourable body of persons, some of whom would, probably, be present at the ceremony itself. Accordingly, on the accession of His present Majesty, opportunity was taken, with almost universal approval, to remedy this long-standing grievance; and, by the Accession Declaration Act, 1910, it was provided that, in the place of the declaration provided by the Act of 1679, the King or Queen shall simply declare, that he or she is a faithful Protestant, and that he or she will uphold and maintain the enactments which secure the Protestant succession to the throne.

[Protection and subjection being in their very nature reciprocal, we may now pass from the duties of

(a) S. 2.

Act, 1706, art. xxv. ss. 2, 3, 5;

(b) S. 1.

Union with Ireland Act, 1800,

(c) Union with Scotland

art. v.



[the monarch to the duties of the people; in other words, to the subject of *allegiance*. Now allegiance is the tie, or *ligamen*, which binds the subject to the ruler, in return for the protection which the ruler affords to the subject. Under the feudal system, there was a mutual trust or confidence subsisting between the lord and his vassal. The vassal was bound to be faithful to his lord, and defend him against all his enemies; which obligation on the part of the vassal was called his *fealty*, and the oath of fealty was required from all tenants by their lords. This oath of fealty, or the ceremony of homage which accompanied it, usually contained, however, a saving or exception of the faith due to some superior lord by name; as where the lord, being but a *mesne* lord, was himself also a tenant or vassal. But where the lord was the absolute superior himself, and was vassal to no man—which is the position of the monarch—it was no longer called the oath of fealty, but the oath of allegiance; the subject, whether landholder or not, swearing to bear faith to his sovereign lord in opposition to all men, *simpliciter* and without any saving or exception—*contra omnes homines fidelitatem fecit* (a). Accordingly, the oath of allegiance, as administered in this country for upwards of six hundred years, contained a promise “to be true and faithful to the “King and his heirs, and truth and faith to bear of “life and limb and terrene honour; and not to know “or hear of any ill or damage intended him, without “defending him therefrom” (b). But, at the Revolution, another form was introduced by the convention parliament (c); the subject only promising that he will “be faithful and bear true allegiance” to the monarch, without mentioning ‘his heirs,’ or speci-

(a) 2 Feud. 99.

Calvin's Case (1608) 7 Rep.

(b) Mirrour, ch. 3, s. 35; 6 b.

Fleta, 3, 16; Britton, cap. 29; (c) 1 W. &amp; M. (1688) c. 8.

[fying in the least wherein that allegiance consists.] Finally, the form now in use was adopted in the year 1868, when, by the Promissory Oaths Act of that year (*a*), the formerly several oaths of allegiance, supremacy, and abjuration were abolished, and a simple and comprehensive promise of allegiance to the King, his heirs and successors, substituted therefor. At one time the repeated exaction of the oath of allegiance from suspected persons was made the occasion of much oppression. But now the Promissory Oaths Act, 1868, provides (*b*), that it shall only be exacted, on acceptance of office, from the persons named in the Schedule to the Act (who, at the same time, take the suitable official or judicial oaths), from members of Parliament, and from a few other persons. Aliens, however, who seek naturalisation are required to take the oath of allegiance (*c*). And any of these persons may substitute an affirmation for the actual oath; and no one need now kiss the book (*d*).

[But beside this express engagement, the law also holds that there is an implied, original, and virtual allegiance owing from every subject to his sovereign, antecedently to and independently of any express promise. For, as the King, by the very descent of the Crown, is fully invested with all the rights, and bound to all the duties, of sovereignty before his coronation, so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage, and fealty; the formal profession of subjection being nothing more than a declaration in words of what was before implied in law. Which occasions Sir Edward Coke very justly to observe, that “all “subjects are equally bounden to their allegiance as if “they had taken the oath; and the taking of the

(*a*) S. 2.

(*b*) S. 9.

(*c*) S. 14.

(*d*) S. 11; Oaths Act, 1888,  
s. 1; Oaths Act, 1909.

[“corporal oath is but an outward declaration of the “same” (a).

Allegiance, both express and implied, is distinguished by the law into two species; the one natural, the other acquired. *Natural* allegiance is such as is due from natural-born subjects (b). And this is a tie which, according to the rules of the common law, could not be severed or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature; for *nemo potest exuere patriam*. An Englishman who removed to France or to China, owed the same allegiance to the King of England there as at home; and twenty years afterwards, as well as then. For it was a principle of our law, that the natural-born subject of one prince could not by any act of his own—not even by swearing allegiance to another—put off or discharge his natural allegiance to the former (c). It is true that the natural-born subject of one prince, to whom he owed allegiance, might be entangled by subjecting himself absolutely to another (d); but it was his own fault that brought him into these straits and difficulties of owing service to two masters (e).

Local allegiance, on the other hand, is a species of *acquired* allegiance, and is such as is due from an alien, or stranger born, for so long time as he continues in

(a) 2 Inst. 121.

(b) *Calvin's Case* (1608) 7 Rep. 5 b.

(c) 1 Hale, P. C. 68.

(d) *Marryat v. Wilson* (1799) 1 Bos. & Pul. 443.

(e) The operation of the maxim *nemo potest exuere patriam*, is exemplified in the case of *Æneas Macdonald* (in 1746), who was a native of Great Britain, but, having received his education from early infancy in France, and

having spent his riper years in a profitable employment in that kingdom, had accepted a commission in the service of the French King. While acting under that commission, he was taken in arms against the King of England, and was indicted therefor and convicted of high treason. He was, however, pardoned upon condition of his leaving the kingdom, and continuing abroad during his life.

[the King's dominions (a). It ceases the instant such stranger transfers himself from such dominions to those of another ruler ; because allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects at all times and in all countries, so their allegiance to him is correspondingly universal and permanent. But as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence, and, in point of locality, to the dominions of the British Empire. From which considerations Sir Matthew Hale deduces this consequence, that, though there be an usurper of the Crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practise anything against his crown and dignity (b) ; and accordingly we find, in fact, that, even after the true prince has regained the sovereignty, such attempts against the usurper, unless in defence or aid of the rightful king, have been afterwards punished with death, because of the breach of that temporary allegiance, which was due to him as king *de facto*.]

But the doctrine of the perpetual character of natural allegiance must now be taken with some qualification. For the Naturalization Act, 1870, provides, that any British subject who, when in any foreign state and not under any disability, voluntarily becomes naturalized in that state, shall thenceforth be deemed to have ceased to be a British subject, and be regarded as an alien ; provision being at the same time made to enable such person, on the same conditions as other aliens, to obtain from the Secretary of State a certificate

(a) *Calvin's Case* (1608) 7      (b) 1 Hale, P. C. 60.  
Rep. 6 a.

of re-admission to British nationality (a). And the Act also provides, that any person who is a natural-born British subject, but who also at the time of his birth became, under the law of any foreign state, a subject of that state, may make a declaration of alienage; and shall thenceforth cease to be a British subject (b).

When an alien has been naturalized, his allegiance, though acquired, is perpetual and universal; at least until he has done some formal act to renounce it. He becomes, therefore, in all respects a British subject, though not a natural-born subject. But there is what may be called a minor or partial kind of naturalization, known as *denization*, which is effected under the royal prerogative, while complete naturalization can only be granted under the provisions of an Act of Parliament. And thus there are, in respect of allegiance, four distinguishable conditions of persons, viz., (1) natural-born subjects; (2) aliens; (3) denizens; and (4) persons naturalized. The distinctions between these four classes may be briefly explained (c).

1. *Natural-born subjects*.—By the common law, all persons born within the limits of the British dominions fall, *primâ facie*, within this description, and no others (d); and for this purpose a British ship, whether on the high seas or in foreign territorial waters, is deemed to be part of the British dominions (e). The common

(a) Naturalization Act, 1870, ss. 6, 8. Any British subject who, before the passing of the Act, had become naturalized in a foreign state, was enabled to preserve his British nationality by making a declaration of his desire so to do within a limited period, viz., two years after the 12th May, 1870.

(b) *Ibid.* s. 4.

(c) See generally on the subject of British nationality, Dicey, *Conflict of Laws*, p. 173, and the report of the Inter-Departmental Committee on the Naturalization Laws (1901, Cd. 723).

(d) *Calvin's Case* (1608) 7 Rep. 18 a.

(e) Hall, *Foreign Jurisdiction of the Crown*, p. 18.

law rule extends even to those born of alien parents in territory forming part of the British dominions ; unless the parents are alien *enemies*, and the birth takes place during hostile occupation of that territory (a).

On the other hand, a man born within any part of the British dominions of parents who are alien enemies, and during the hostile occupation of that part of the British dominions, or born (of whatever parents) in a country not parcel of the British dominions, is, by the common law, an alien. Wherefore it became necessary, after the Restoration, to pass a particular Act of Parliament, “for the naturalization of children of His Majesty’s English subjects born in foreign countries during the late trouble,” *i.e.*, during the Commonwealth (b).

This rule of the common law is, however, subject to certain exceptions recognised by the common law itself, and to certain exceptions introduced by statute. These exceptions are as follows :—

(i.) The children of the King or Queen, and the heirs to the Crown, wherever born, have always been held natural-born subjects.

(ii.) The case has always been the same with regard to the children of British ambassadors, born abroad (c) ; for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is accredited, therefore the son is held to be born under that King’s allegiance, represented by his father the ambassador.

[(iii.) To encourage foreign commerce, it was enacted, by the 25 Edward 3 (1350) st. 1, that all children born abroad, provided *both* their parents were, at the time of their birth, in allegiance to the King, and the mother had passed the seas by her husband’s consent,

(a) Com. Dig. *Alien* (A),  
(B) ; Hall, *Foreign Jurisdic-  
tion of the Crown*, p. 18.

(b) 29 Car. 2 (1677) c. 6.  
(c) *Calvin’s Case*, *ubi sup.*

[might inherit as if born in England (*a*); and it hath been so adjudged on behalf of merchants (*b*).

(iv.) By several more recent statutes, the restriction of the common law has been still further relaxed (*c*); so that now any person born abroad whose *father* or *paternal grandfather* was born in the British dominions, is deemed to be a natural-born subject himself to all intents and purposes; unless the *father* in either case has ceased to be a British subject before the date of the birth of the person in question (*d*). But this privilege does not extend beyond the second generation.]

2. *Aliens*.—Aliens are either alien enemies or alien friends. Alien enemies have no rights or privileges whatsoever; unless by the King's special favour. Thus, the right of action on a contract entered into by an alien with a British subject during peace is suspended during hostilities; and a contract made with him by a British subject during hostilities, except with the permission of the Crown, is void (*e*). According to the common law rule, any one might seize the property of an alien enemy; but this rule is now confined to capture under the authority of the executive, according to the rules of modern warfare. As regards alien friends, their rights, although now largely assimilated to those of natural-born subjects, still present certain distinctions. Formerly, as was explained in a previous volume (*f*), an alien could not in general inherit lands within this realm, nor had he any inheritable blood, so as to transmit an estate in land, by descent. And

(a) *Doe v. Jones* (1791) 4 T. R. 300.

(b) *Bacon v. Bacon* (1640) Cro. Car. 601; Mar. 91; Jenk. 3.

(c) Foreign Protestants (Naturalization) Act, 1708; British Nationality Act, 1730;

British Nationality Act, 1772.

(d) Dicey, *Conflict of Laws*, p. 177.

(e) *Willison v. Patteson* (1817) 7 Taunt. 439; *Janson v. Driefontein Consolidation Mines* [1902] A. C., at p. 499.

(f) Vol. i. pp. 330–331.

[though an alien might purchase lands, yet by the old law the King became thereupon entitled to them ; for, it was said, if an alien could acquire lands in England, he must owe allegiance to the King of England, and this nation might besides in time become subject to foreign influences and feel other inconveniences. But an alien, being the subject of a friendly state and a merchant, was allowed to hire a house for his habitation ; and might always hold personal property and make a will regarding it (a).]

And now, under the Naturalization Act, 1870, real and personal property of every description may be acquired, held, and disposed of, by an alien ; and a title to such property may be derived through, from, or in succession to an alien, in the same manner in all respects as by, through, from, or in succession to a natural-born British subject (b). This provision, however, is not retrospective (c) ; and nothing in the Act is to qualify an alien to be the owner of a British ship (d). An alien cannot be a privy councillor or a member of Parliament ; nor can he hold any public office, whether civil or military (e), or exercise any franchise, whether parliamentary or municipal. And the Naturalization Act, 1870, does not qualify an alien for any such office or franchise, or entitle him to any rights or privileges as a British subject ; except those which by the Act are expressly given to him (f).

It seems that the Crown enjoyed at common law

(a) *Godfrey v. Dixon* (1620) 2 Roll. Rep., at p. 94.

(b) Naturalization Act, 1870, s. 2.

(c) *Sharp v. St. Sauveur* (1871) L. R. 7 Ch. App. 343.

(d) Naturalization Act, 1870, s. 14 ; Merchant Shipping Act, 1894, s. 1.

(e) Though the Army Act,

s.c.—VOL. II.

1881, s. 95, allows a limited number of aliens to be enlisted in the army, no person so enlisted is capable of becoming an officer.

(f) Com. Dig. *Alien* ; Naturalization Act, 1870, s. 2. See also Parl. Paper, 1901, Cd. 723.



the right of excluding or expelling from the country any alien (*a*) ; and it is clear that an alien has not any right, enforceable by action, to enter British territory (*b*). Further, from time to time temporary Acts have been passed, especially in times of great political unrest, giving the Crown express power to exclude or expel aliens, and creating the necessary machinery for the purpose (*c*) ; and now the Aliens Act, 1905, provides for the exclusion in certain cases from the United Kingdom of aliens who are criminals or in destitute circumstances, and allows the Secretary of State to make orders for the expulsion from the United Kingdom of aliens convicted of offences of a certain gravity by any Court, and recommended by the Court for expulsion, and of aliens who have become within a limited time of their arrival in the United Kingdom a charge on the rates, or who have been sentenced for crime abroad.

3. *Denizens*.—[A denizen is one alien born, but who has obtained *ex donatione regis* letters patent to make him, to a certain extent, an English subject (*d*). A denizen is in a kind of middle state between an alien and a natural-born subject, and partakes of both of them. He cannot be of the Privy Council ; or become a member of either House of Parliament ; or hold any office of trust, civil or military (*e*).] The Naturalization Act, 1870, expressly provides, that nothing therein contained shall affect the grant of any letters of deni-

(*a*) Chitty, *Prerogatives of the Crown*, p. 49.

(*b*) *Musgrove v. Chun Tee-ong Toy* [1891] A. C. 272.

(*c*) *E.g.*, 55 Geo. 3 (1815) c. 54 and 11 & 12 Vict. (1848) c. 20 (known respectively as the Alien Act, 1815, and the Alien Act, 1848), the Prevention of Crime (Ireland)

Act, 1882, s. 15, and Chitty, *ubi sup.*

(*d*) *Calvin's Case* (1608) 7 Rep. 25 b ; *Wilson v. Marryat* (1798) 8 T. R. 31 ; Chitty, *Prerogatives of the Crown*, p. 15.

(*e*) Act of Settlement, 1700, s. 3.

zation by the Crown (*a*) ; but apparently, as an alien now can, so a denizen also may, hold lands in England.

4. *Aliens naturalized*.—Naturalization may be effected either by private Act of Parliament or by the certificate of a Secretary of State. In the first case, naturalization usually confers on the alien exactly the same legal condition as if he had been born in the King's ligeance, and has a retrospective effect ; so that, if a man is naturalized by Act of Parliament, his son, born before, may inherit through him, independently of the rights in such respect given by the Act of 1870 (*b*).

Naturalization by certificate of the Secretary of State was introduced for the first time by an Act of 1844 (7 & 8 Vict. c. 66), whereby foreigners coming to reside and settle in the United Kingdom were enabled to obtain the advantages of naturalization in a less expensive and tedious way than by procuring a private Act. That statute has now been repealed (*c*) ; but by the Naturalization Acts, 1870 and 1872, an alien who has either resided in the United Kingdom, or been in the service of the Crown, for not less than five years, and who intends, when naturalized, either to reside in the United Kingdom, or to serve under the Crown, is enabled to apply for a certificate of naturalization. The Secretary of State, after receiving the necessary evidence in support of the application, may, if he so think fit, issue to the applicant a certificate accordingly. Thereupon, and upon his taking the oath of allegiance (*d*), the alien becomes entitled in the United Kingdom to all political and other rights, powers, and privileges, and becomes subject to all the obligations, to which a natural-born British subject is entitled and subject in the United Kingdom ; with the

(*a*) S. 13.

(*b*) Co. Litt. 129 a.

(*c*) By the Naturalization Act, 1870.

(*d*) See the Naturalization (Oath) Act, 1870, as amended by the Perjury Act, 1911, s. 17.

qualification, that when he is within the limits of the state of which he was a subject, he is not to be deemed a British subject unless he has lawfully ceased to be a subject of that state (*a*). As regards the children of such naturalized alien, it appears that, under the Act of 1870, they only become British subjects if either they were born in the dominions of the Crown, or if they were infants at the date of the naturalization of their father, and subsequently resided in the United Kingdom. But, by the Naturalization Act, 1895, such children who afterwards reside abroad with their father, while he is in the service of the Crown, are to be deemed naturalized (*b*).

(*a*) Naturalization Act, *International Law* (4th edn.), 1870, s. 7. p. 354.

(*b*) See Westlake, *Private*

## CHAPTER III.

## OF THE TITLE TO THE CROWN.

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[THE fundamental maxim, upon which the right of succession to the throne of this empire depends, seems to be, that the Crown is, by common law and constitutional custom, hereditary, and this in a manner peculiar to itself ; but that the right of inheritance may from time to time be changed or limited by Act of Parliament, under which limitations the Crown still continues hereditary. It will be the business of this chapter, therefore, to show, first, that the Crown is hereditary ; second, that it is hereditary in a manner peculiar to itself ; third, that this inheritance is subject to limitation by Parliament ; lastly, that, when it is so limited, it is hereditary in the new occupant (*a*).

1. First, the Crown is hereditary, or descendible to the next heir, on the death or demise of the last proprietor ; but by this assertion of an hereditary title, a *jure divino* title to the throne is by no means intended, save so far as kingdoms, like other things, are in the disposition of Providence. And all that is intended is, that the hereditary principle is affirmed or declared, by the municipal law of England ; in the present instance by the statute generally known as the Act of Settlement, passed in the year 1700 (*b*).

(*a*) See Anson, *Law and Custom* (3rd edn.), vol. ii. part ii. ch. iv. (This somewhat curious state of things is, no doubt, the result of an

historical conflict between the hereditary and the elective principles, in which neither was completely victorious.)

(*b*) 12 & 13 W. 3, c. 2, s. 1.

[2. Second, the mode of inheritance of the Crown corresponds in general with the feudal law of descents. For the Crown descends, like estates, lineally to the issue of the reigning monarch, or rather, to the issue of the stock of descent, in this case the Princess Sophia of Hanover ; and the preference of males to females, and the right of primogeniture among the males, are canons of descent which are strictly observed. Also, the Crown, on failure of the male line, descends, like lands or tenements, to the issue female ; but among the females, the Crown descends, by right of primogeniture, to the eldest daughter only and her issue, and not, as in common inheritances, to all the daughters equally as co-parceners (*a*). Again, the doctrine of representation, whereby the lineal descendants of any person deceased stand in the same place as their ancestor, if living, would have done, prevails in the descent of the Crown, as it does in other inheritances. And, on the total failure of lineal descendants, the Crown goes to the next collateral relations of the late sovereign, provided they are lineally descended from the blood royal ; that is, from that royal stock which originally acquired the Crown. Nor was there ever any objection to the succession of the half blood ; provided only, that the common ancestor were one through whom the blood royal is communicated to each. Thus, Mary the First inherited to Edward the Sixth, and Elizabeth inherited to Mary ; all children of the same father, King Henry the Eighth, but all by different mothers. It will be observed, however, that, in the matter of collateral descents, the succession to the Crown resembles rather the descent of an inheritance under the old common law, than under the rules of the Inheritance Act, which have no concern with titles or dignities.

3. Third, the hereditary right may be set aside

(*a*) See Co. Litt. 165 a.

[by Act of Parliament, and a new or modified right of succession may be substituted ; and this is strictly consonant to our laws. For, as the power can nowhere be more properly lodged than in the reigning monarch and the two Houses of Parliament, therefore in the Kings, Lords, and Commons, in Parliament assembled, our laws have expressly lodged it. Examples of the exercise of this power are frequent in our history ; the last being that which took place at the passing of the Act of Settlement, previously alluded to (*a*), when the succession was transferred from the issue of King James the Second, who, as the law then stood, were clearly entitled to it, to the Princess Sophia of Hanover, who represented a remoter branch of the royal stock.

4. But, fourthly, however the Crown may, for the time being, stand or be limited, it still retains its descendible quality, becoming hereditary in the wearer in the same manner as it was before hereditary in his predecessor ; save and except, of course, so far as in the words of new limitation it is otherwise expressed.

These four points in the law of the hereditary right to the throne are made clear beyond all dispute, when the actual historical succession to the Crown is regarded ; for we find, that, from the days of Egbert down to the present time, the four cardinal maxims above mentioned have ever been the canons of succession. And although the succession, through fraud or force—or sometimes of necessity, as when in hostile times the Crown descended on a minor—has been occasionally suspended, yet it has always returned back into the old hereditary channel.

In or about the year 800 A.D., King Egbert, by virtue of a long and undisturbed descent from his ancestors of above three hundred years (*b*), was in possession

(*a*) See *ante*, p. 549.

Egbert succeeded as the only surviving descendant of

[of the throne of the West Saxons ; and when he acquired the other kingdoms of the heptarchy, some by conquest and others by a voluntary submission, these latter kingdoms adopted the West Saxon laws and customs. And since the union of the heptarchy in King Egbert, there hath ever been, throughout the whole of England, a general acquiescence in the hereditary monarchy of the West Saxons. Thus, from Egbert to the death of Edmund Ironside, a period of above two hundred years, the Crown descended through a succession of fifteen princes of the same royal family ; though the course of descent in other respects was subject to some irregularities (a). For Edmund Ironside was obliged, by the hostile irruption of the Danes, at first to divide his kingdom with Canute, King of Denmark ; and Canute, after Edmund's death, seized the whole kingdom to himself. In this way the old right of succession was suspended by actual force, and so continued during three reigns ; but, upon the death of Hardiknute, the antient Saxon line was restored in the person of Edward the Confessor, who was the surviving son of Ethelred, the father and predecessor of Edmund Ironside (b).

On the decease of Edward the Confessor without issue, Harold the Second usurped the throne, while William the Conqueror also claimed the Crown, under a pretended gift from Edward the Confessor ; whereas

Cerdic, who at the head of a colony of Saxons had invaded the western parts of the island A.D. 495, and founded what was afterwards called Wessex, or the West Saxon Kingdom (Turner, *Hist. Anglo-Saxons* (6th edn.), vol. i. pp. 269, 270, 271, 420).

(a) With reference to these irregularities, Mr. Hallam says :—"The Saxons, like

"most European nations, while they limited the inheritance of the crown exclusively to one royal family, were not very scrupulous about the devolution upon the nearest heir" (*Middle Ages* (12th edn.), vol. ii. p. 271).

(b) Turner, *Hist. Anglo-Sax.* vol. ii. p. 355.

[in fact the true title to the Crown was, all the time, in Edgar the Atheling, son of Edward the Outlaw, and grandson of Edmund Ironside. William the Norman eventually established his claim at the battle of Hastings ; and Edgar Atheling's undoubted right was overwhelmed by the violence of the times.

The victory obtained by William the Conqueror at Hastings was a victory over the person of Harold only, and not over the English nation (*a*). Consequently, although William acquired the Crown thereby, he acquired it subject to the laws of England ; and the title to the Crown remained therefore hereditary as before, although in a new stock or root of descent. Accordingly, from William the First (otherwise called the Conqueror), the Crown descended to his sons William the Second and Henry the First ; the eldest son, Robert, being kept out of possession by the arts and violence of his brothers. This may perhaps have been in accordance with the theory which prevailed for some time in the law of descents, that when the eldest son was already provided for (as Robert was constituted Duke of Normandy by his father's will), the next brother was entitled to enjoy the rest of their father's inheritance. But, as Robert died without issue, Henry at last acquired a good title to the throne, whatever he might have had at first.

Stephen of Blois, who succeeded to Henry, was indeed the grandson of the Conqueror, by Adelicia, his daughter, and claimed the throne by a feeble kind of hereditary right ; that is, not as being the nearest of the male line, but as the nearest male of the blood royal. The real right was, however, in the Empress Matilda or Maud, the daughter of Henry the First ; the rule of succession being (where women are admitted at all) that the daughter of a son shall be preferred to the son of a daughter. Stephen therefore was little

(*a*) Hale, *Hist. C. L.* ch. 5 ; Seld., *Review of Tithes*, ch. 8.



[better than a mere usurper, and chose rather to rely on his title by election; but the dispute between Maud and Stephen was ended by the compromise of Wallingford, whereby Stephen kept the Crown, while Henry (the son of Maud) succeeded him. This Henry was the undoubted heir of William the Conqueror; and he was also lineally descended from Edmund Ironside. For Edward the Outlaw, the son of Edmund Ironside, had, besides Edgar Atheling, who died without issue, a daughter, Margaret, who was married to Malcolm, King of Scotland; and by Malcolm she had several children, among the rest Matilda, the wife of Henry the First, whose daughter was the Empress Maud, Henry's mother. The Saxon line was, therefore, in a manner, restored in the person of Henry the Second, although the true hereditary right was in the *sons* of Malcolm by Margaret.

From Henry the Second, the Crown descended to his eldest son, Richard the First: upon whose death, childless, the right vested in his nephew Arthur, the son of Geoffrey, his next brother. But John, the youngest son of King Henry, seized the throne; claiming the Crown, as appears from his charters, by hereditary right (*a*). That is to say, John was next of kin to the deceased King, being his surviving brother; whereas Arthur was removed one degree farther, being his brother's son, though by right of representation he stood in the place of his father, Geoffrey. It is to be remembered that, in the reign of King Henry the Second, it was a point undetermined, whether, even as regarded the descent of real property, the child of an elder brother should succeed to the land in right of representation, or the younger surviving brother in right of proximity of blood (*b*)—a point which long

(*a*) — *Regni Angliæ, quod* Wilkins, 345).  
*nobis jure competit hæreditario.* (*b*) Glanv. l. 7, cap. 3.  
 —Spelm. *Hist. R. Joh.* (apud

[afterwards remained undecided, in the collateral succession to the fiefs of the empire (*a*). However, on the death of Arthur, and his sister Eleanor, without issue, a clear and indisputable title vested in Henry the Third, the son of John : and from him to Richard the Second, a succession of six generations, the Crown descended in the true hereditary line. And by the 25 Edw. 3, st. 2 (1350), it was declared, “ that the law of “ the Crown of England is, and always hath been such, “ that the children of the Kings of England, born “ in England or elsewhere, be able and ought to bear “ the inheritance after the death of their ancestors.”

Upon Richard the Second's resignation of the Crown, the right resulted to the issue of Edward the Third, the grandfather of Richard. Edward the Third had had many children besides his eldest son, Edward the Black Prince, who was the father of Richard the Second ; but of these children we need mention only three, namely, William the second son, who died without issue, Lionel Duke of Clarence, the third son, and John of Gaunt, Duke of Lancaster, the fourth son. By the rules of succession, therefore, the posterity of Lionel Duke of Clarence were entitled to the throne upon the resignation of Richard, and had been in fact declared by the King, many years before, to be his presumptive heirs ; and that declaration had been also confirmed in Parliament. Inasmuch, however, as Henry Duke of Lancaster, the son of John of Gaunt, had then a large army in the kingdom, it was impossible for any other title to be asserted ; and he became King under the title of Henry the Fourth. But, as Sir Matthew Hale remarks (*b*), though the people unjustly assisted Henry the Fourth in his usurpation of the Crown, yet he was not admitted thereto until he had declared that he claimed, not as a conqueror—which

(*a*) *Mod. Un. Hist.* xxx. 512.

(*b*) *Hist. C. L.* ch. 5.

[he very much inclined to do (a)—but as a successor, descended by right line of the blood royal. In order to this, he set up two titles ; the one upon the pretence of being the first of the blood royal in the purely male line, the Duke of Clarence having left only one daughter, Philippa, from whom, through a marriage with Edmund Mortimer Earl of March, the House of York descended ; the other, by reviving an exploded rumour, that Edmund Earl of Lancaster (to whom Henry's mother was heiress), was in reality the elder brother of King Edward the First, though his parents had, on account of his personal deformity, imposed him on the world for the younger. However, by the statute 7 Hen. 4 (1405) c. 2, it was enacted, that the inheritance of the Crown should be and remain in the person of Henry the Fourth, and in the heirs of his body issuing ; and Prince Henry was declared heir apparent to the Crown, to hold to him and the heirs of his body issuing, with remainder to the King's other sons and the heirs of their bodies respectively. The enacting of this statute shows that it was then generally understood, that the King and Parliament had a right to new-model and regulate the succession to the Crown (b) ; and thereafter the Crown descended regularly from Henry the Fourth, to his son and grandson, Henry the Fifth and Henry the Sixth. But in the reign of the latter the House of York re-asserted their dormant title, and at last established it, in the person of Edward the Fourth. It is at the time of this King's accession that we first meet the distinction between a king *de jure* and a king *de facto*. Thus, the 1 Edw. 4 (1461) c. 1, designates Henry the Fourth, Henry the Fifth, and Henry the Sixth as "late kings of England "successively, in deed and not of right" ; and in all the charters of King Edward, wherever he has occa-

(a) Seld. *Tit. Hon.* 1, 3.

(b) 4 Inst. 37, 205.

[sion to speak of the line of Lancaster, he calls them *nuper de facto, et non de jure, reges Angliæ*.

Edward the Fourth left two sons and five daughters. The eldest of these sons, King Edward the Fifth, enjoyed the regal dignity for a very short time, and was then deposed by Richard, his unnatural uncle, who immediately usurped the royal dignity, having previously insinuated to the populace a suspicion of bastardy in the children of Edward the Fourth, in order to make some show of hereditary title ; and he is generally believed to have afterwards murdered his two nephews, upon whose death the true right to the Crown devolved upon their eldest sister, Elizabeth. When the tyrannical reign of King Richard the Third gave occasion to Henry Earl of Richmond to assert his title to the Crown—a title the most remote that was ever set up, and one which nothing could have given success to, but the universal detestation of Richard, who was regarded as a usurper of the rights of the last-mentioned Elizabeth (*a*)—Henry procured from Parliament a declaration of his title ; and an Act was passed to the effect “ that the inheritance of the Crown “ should rest, remain, and abide in King Henry the “ Seventh and the heirs of his body,” thereby providing for the future, and acknowledging the present possession, but not determining either way, whether that possession was *de jure* or *de facto* merely. Soon afterwards, however, Henry married Elizabeth of York, the true heiress of the Conqueror ; and thereafter the Act made in his favour was totally disregarded, and was never printed in our statute books (*b*).

Henry the Eighth, the issue of the marriage of Henry the Seventh and Elizabeth, succeeded to the Crown by clear indisputable hereditary right ; his eldest brother, Prince Arthur, having died without issue.

(*a*) 4 Inst. 37.

(*b*) *Ibid.*

[And, on his death, he transmitted the Crown to his three children in due order. But in his reign we find the Parliament at several times occupied in regulating the succession to the kingdom. Thus, first, the 25 Hen. 8 (1534) c. 22, which recites the mischiefs which had ensued and might ensue by disputed titles, enacts that the Crown shall be entailed to His Majesty, and the sons or heirs male of his body : and in default of such sons, to the Lady Elizabeth (who is declared to be the King's eldest issue female, to the exclusion of the Lady Mary, on account of her supposed illegitimacy by the divorce of her mother Queen Catherine), and to the heirs of the body of the Lady Elizabeth ; "and so from issue female to issue female, and the "heirs of their bodies, by course of inheritance according to their ages, as the Crown of England hath been "accustomed and ought to go, in case where there be "heirs female to the same : and for default of such "issue, then to the King's right heirs for ever." Afterwards, on Henry's divorce from Anne Boleyn, this statute was, with regard to the settlement of the Crown, repealed by the 28 Hen. 8 (1536) c. 7. By this Act, the Lady Elizabeth was bastardised as well as the Lady Mary ; and the Crown was settled on Henry's children by Queen Jane Seymour, and his future wives, and, in default of such children, then with this remarkable remainder, "to such persons as the King by "letters patent, or last will and testament, shall limit "and appoint the same." But a few years afterwards, by the 35 Hen. 8 (1543) c. 1, Mary and Elizabeth were again legitimated ; and the Crown was limited to Prince Edward by name, after that to the Lady Mary, and then to the Lady Elizabeth, and the heirs of their respective bodies. And this succession, which was indeed no other than the usual course of the law with regard to the descent of the Crown, took effect accordingly ; although the Act still left the King the right

[of appointing his successor on failure of those three lines.

Lest there should remain any doubt in the minds of the people, through this jumble of Acts for limiting the succession, Queen Mary's hereditary right to the throne was acknowledged by the 1 Mar. st. 2 (1554), c. 1, in these words :—" The Crown of these realms is " most lawfully, justly, and rightly descended and " come to the Queen's Highness that now is, being the " very, true, and undoubted heir and inheritrix thereof." And, again, on the Queen's marriage with Philip of Spain, by the statute which settled the preliminaries of the match, the hereditary right to the Crown was again asserted (a).

On Queen Elizabeth's accession, her right was also recognised by Parliament, and in still stronger terms than her sister's, namely, in the words following :—" The Queen's Highness is, and in very deed and of most " mere right ought to be, by the laws of God and the " laws and statutes of this realm, our most lawful and " rightful sovereign liege Lady and Queen ; and Her " Highness is rightly, lineally, and lawfully descended " and come of the blood royal of this realm of England, " in and to whose princely person, and the heirs of " her body lawfully to be begotten, after her, the " imperial Crown and dignity of this kingdom are " vested, limited, and annexed " (b). And by the 13 Eliz. (1571) c. 1, we find the right of Parliament to direct the succession of the Crown distinctly asserted. This Act provides, that it shall be treason to affirm that the laws and statutes do not bind the right to, and the descent, limitation, and inheritance of, the Crown ; and that any person who shall, during the Queen's life, expressly affirm, before the same is established by Parliament, that any particular person is or ought to be heir and successor to the Queen, except the same

(a) 1 Mar. st. 3 (1554), c. 2.

(b) 1 Eliz. (1558) c. 3.

[shall be the natural issue of her body, shall, for the first offence, suffer imprisonment and the loss of half his goods, and for the second, incur the penalty of a *præmunire*.

On the death of Queen Elizabeth without issue, the line of Henry the Eighth became extinct ; and it became necessary to recur to the other issue of Henry the Seventh by Elizabeth of York. Their eldest daughter Margaret had married King James the Fourth of Scotland ; and James the Sixth of Scotland, and the First of England, was the lineal descendant from that alliance. So that, in his person, as clearly as in Henry the Eighth, centred all the claims of different competitors, from the Conquest downwards ; he being indisputably the lineal heir of the Conqueror. And what is still more remarkable, there also centred in him the right of the Saxon monarchs, which had been suspended from the Conquest, till his succession. For Margaret, sister of Edgar Atheling, daughter of Edward the Outlaw, and granddaughter of Edmund Ironside, was the person in whom the hereditary right of the Saxon Kings, supposing it not to have been abolished by the Conquest, resided. She married Malcolm of Scotland. The royal family of Scotland, from that time downwards, were the offspring of Malcolm and Margaret, of which royal family King James the First of England was the direct lineal heir.

James the First, therefore, united in his person every possible claim by hereditary right to the English as well as to the Scottish throne ; and it was in virtue of this claim that he succeeded to the throne, notwithstanding that Henry the Eighth had, under the above-mentioned Act of 1543, purported to exclude the line of Margaret. And the English Parliament did, accordingly, by the 1 Jac. 1 (1604) c. 1, “ recognise and “ acknowledge, that immediately upon the dissolution “ and decease of Elizabeth, late Queen of England, the

["imperial Crown of the realm of England did by  
 "inherent birthright, and lawful and undoubted suc-  
 "cession, descend and come to your most excellent  
 "Majesty, as being lineally, justly, and lawfully, next  
 "and sole heir of the blood royal of this realm" (a).  
 The hereditary rights which had so centred in James  
 the First were transmitted to his son and heir, King  
 Charles the First; and from him they descended to  
 King Charles the Second, on whose Restoration in  
 1660, it was declared by both Houses of Parliament,  
 "that according to their duty and allegiance they did  
 "heartily, joyfully, and unanimously acknowledge  
 "and proclaim, that, immediately upon the decease of  
 "our late sovereign lord, King Charles, the imperial  
 "Crown of these realms did, by inherent birthright  
 "and lawful and undoubted succession, descend to his  
 "most excellent Majesty, Charles the Second, as being  
 "lineally, justly, and lawfully, next heir of the blood  
 "royal of this realm" (b).

Thus it clearly appears, that the Crown of England  
 hath been ever an hereditary Crown, though subject  
 to limitations by Parliament; and the remainder  
 of this chapter will be chiefly concerned with those  
 instances wherein, since the Restoration, Parliament  
 hath asserted or exercised this right of limiting  
 the succession—a right which, as we have seen, had  
 been previously asserted in the reigns of Henry the  
 Fourth, Henry the Seventh, Henry the Eighth, Queen  
 Mary, and Queen Elizabeth.

The first instance in point of time is the famous  
 Bill of Exclusion in the latter end of the reign of

(a) Elizabeth of York, the  
 mother of Queen Margaret of  
 Scotland, was heiress of the  
 House of Mortimer. And Mr.  
 Carte observes, that the House  
 of Mortimer, in virtue of its  
 descent from Gladys, only

sister to Llewellyn ap Jor-  
 werth the Great, had the true  
 right also to the principality  
 of Wales. (*Hist. Eng.* iii.  
 705.)

(b) Com. Journ. 8th May,  
 1660.



[Charles the Second; the object of the Bill being to set aside the King's brother and presumptive heir, James Duke of York, on the score of his being a papist. But although the Bill passed the House of Commons, it was rejected in the Lords; the King having also declared beforehand that he never would consent to it. From this transaction we may collect two things: (1) that the Crown was universally acknowledged to be hereditary, and the inheritance indefeasible unless by Parliament, and (2) that the Parliament could have defeated the inheritance. For the Commons acknowledged the hereditary right; and the Lords did not dispute the power, but merely the propriety, of the exclusion. However, as the Bill took no effect, James the Second succeeded to the throne of his ancestors; and might have enjoyed it during the remainder of his life, but for his own infatuated conduct, which, combining with other circumstances, brought on the Revolution of 1688.

The true ground and principle upon which that memorable event proceeded, was an entirely new one in politics, viz., the abdication of the reigning monarch, and the vacancy of the throne thereupon. For in full assembly of the Lords and Commons, met together upon the supposition of this vacancy, both Houses came to this resolution:—"That James the "Second, having endeavoured to subvert the constitu- "tion of the kingdom by breaking the original contract "between King and people, and having, by the advice "of Jesuits and other wicked persons, violated the "fundamental laws, and having withdrawn himself "out of this kingdom, has abdicated the government, "and that the throne is thereby vacant" (a). Further, on the 12th February, 1689, the two Houses proceeded to declare on the basis of such resolution, "that "William and Mary, Prince and Princess of Orange,

(a) Com. Journ. 7th Feb. 1689.

[“be and be declared King and Queen, to hold the  
 “Crown and royal dignity during their lives, and the  
 “life of the survivor of them ; and that the sole and  
 “full exercise of the legal power be only in, and  
 “executed by, the said Prince of Orange, in the names  
 “of the said Prince and Princess, during their joint  
 “lives ; and after their deceases the said Crown and  
 “royal dignity to be to the heirs of the body of the said  
 “Princess ; and for default of such issue, to the  
 “Princess Anne of Denmark and the heirs of her  
 “body ; and for default of such issue, to the heirs  
 “of the body of the said Prince of Orange ” (a). And  
 this order of succession, being embodied in the great  
 statute known as the Bill of Rights (b), took effect  
 accordingly.]

Towards the end of King William's reign, on the death of the Duke of Gloucester, who was the last surviving child of the Princess Anne, the King and Parliament thought it necessary again to limit the succession, in order to prevent another vacancy of the throne. The Bill of Rights had already enacted, that every person who should be reconciled to, or hold communion with, the see of Rome, or who should profess the popish religion, or marry a papist, should be excluded from and be for ever incapable to inherit the Crown ; and the King and Parliament now turned their eyes towards the Princess Sophia, Electress of Hanover, the most accomplished Princess of her age, who was a Protestant, and who, as being the daughter of Elizabeth, Queen of Bohemia, daughter of James the First, was the nearest of the antient blood royal, that was not incapacitated by professing the popish religion. On her, therefore, and the heirs of her body, being Protestants, the remainder in the Crown, expectant on the death of King William and

(a) Com. Journ. 12th Feb.  
 1688.

(b) 1 W. & M. st. 2 (1689)  
 c. 2.

[Queen Anne without issue, was settled by the Act of Settlement in 1700 (*a*) ; and it was at the same time enacted, that whosoever should therefore come to the possession of the Crown should join in communion of the Church of England, as by law established (*b*). And it was subsequently enacted, by the Succession to the Crown Act, 1707, that if any person should maliciously, advisedly, and directly maintain, by writing or printing, that the Kings of this realm are not able, with the authority of Parliament, to make laws to bind the Crown and the descent thereof, he should be guilty of treason ; and that if he should maintain the same by advised speaking, he should incur the penalties of a *præmunire* (*c*).

The Princess Sophia died before Queen Anne ; and the inheritance thus limited descended on the former's son and heir, George the First. From him it descended to George the Second ; from him to his grandson and heir, George the Third ;] from him to his son George the Fourth, who, dying childless, was succeeded by his brother William the Fourth. And from the monarch last mentioned, the Crown descended to his heiress, the daughter of his brother Edward Duke of Kent, Her late Majesty Queen Victoria, from her to her son Edward the Seventh, and, on his death, in the year 1910, to his eldest surviving son, His present Majesty, King George the Fifth.

(*a*) 12 & 13 W. 3, c. 2, s. 1.

(*c*) 6 Ann. c. 41, ss. 1-3.

(*b*) *Ibid.* s. 3.

## CHAPTER IV.

## OF THE ROYAL FAMILY.

[It is to be observed, that when a female sits on the throne of these realms in her own right, she is styled 'Queen Regnant'; and a Queen Regnant has the same powers, prerogatives, rights, dignities, and duties as if she were a King, as was expressly declared by the 1 Mar. st. 3 (1554) c. 1. On the other hand, the wife of a reigning King is styled the 'Queen Consort'; and, though exercising no share of the sovereign power, she is, by virtue of her marriage, participant of divers prerogatives above other women (*a*). For, first, the Queen Consort is a public person, exempt and distinct from the King; and she is, and always has been, of ability to purchase lands and to convey them, to make leases, to grant copyholds, and to do other acts of ownership without the concurrence of her lord (*b*)—a privilege as old as the Saxon era. She is also capable at common law of taking a grant from the King (*c*); in which particular she agrees with the Augusta, or wife of the Emperor, of the Roman laws, who, according to Justinian, was equally capable of making a grant to, and of receiving one from, the Emperor (*d*). Moreover, the Queen Consort of England hath separate courts and offices distinct from those of the King, in matters

(*a*) Finch, L. 86.

(*b*) *Clarke v. Pennifather*  
(1584) 4 Rep. 23.

(*c*) 32 Hen. 8 (1540) c. 51;

the Crown Private Estate Act,  
1800.

(*d*) Cod. 5, 16, 26.

[not only of ceremony but of law ; and her attorney and solicitor-general are entitled to a place within the bar of His Majesty's courts, together with the King's Counsel (*a*). She has also always been able to enter into contracts, and sue and be sued without her husband ; and in all legal proceedings she is looked upon as a feme sole, and not as a feme covert (*b*).

The Queen Consort hath also many exemptions and minute prerogatives ; for instance, she pays no toll, and is not liable to amercement in any court (*c*). But in general, unless where the law has expressly declared her exempted, she is upon the same footing with other subjects, being to all intents and purposes the King's subject, and not his equal ; in like manner as, in the imperial law, *Augusta legibus soluta non est* (*d*).

The original revenue of our Queens Consort, before and after the Conquest, consisted in certain rents exclusively appropriated to them out of the demesne lands of the Crown ; and it was frequent in Domesday Book, after specifying the rent due to the Crown, to add likewise the quantity of gold or other renders reserved to the Queen (*e*). And sometimes the particular purpose of the appropriated revenue was specified—as, *e.g.*, to buy wool for Her Majesty's use, to purchase oil for her lamps, or to furnish her attire from head to foot (*f*). For a further addition to her income, moreover, the duty of queen-gold (*aurum reginæ*) was originally granted ; those matters of grace and favour, out of which it arose, being frequently obtained from the Crown by the powerful intercession of the Queen. For queen-gold was due on every voluntary offering or fine to the King amounting to ten marks and upwards, in

(*a*) Seld. *Tit. Hon.* 1, 6, 7.

(*b*) Finch, L. 86 ; Co. Litt. 133 a.

(*c*) Co. Litt. 133 b ; Finch, L. 185.

(*d*) Dig. i. 3, 31.

(*e*) Pryn. *Aur. Reg.*, Append. 2, 3.

(*f*) Mag. Rot. Pip. 2 Hen. 2 ; Madox, *Hist. Exch.* 419.

[consideration of any privileges, grants, licences, pardons or other matters of royal favour, in the proportion of one-tenth of such offering or fine (a) ; but it was not payable in respect of any aid or subsidy granted by Parliament or Convocation, nor on fines imposed by courts on offenders, nor on any voluntary present to the King without consideration moving from him to the subject, nor on any sale or contract whereby the revenues or possessions of the Crown were granted away or diminished (b).

There are traces of the payment of queen-gold in Domesday Book, and in the great Pipe Roll of Henry the First (c) ; it forms a distinct head in the antient Dialogue of the Exchequer (d), written about 1178, and now attributed to Richard FitzNeal, who was Treasurer to Henry the Second in 1158, and subsequently Bishop of London (e) ; and from that time downwards it was regularly claimed and enjoyed by all the Queens Consort of England till the death of Henry the Eighth. But after the accession of the Tudor family, the collecting of it was much neglected ; and, there having been no Queen Consort afterwards till the accession of James the First, a period of nearly sixty years, the very nature and quantity of queen-gold became then a matter of doubt. And when the question was referred by that King to the Chief Justices and Chief Baron, their report of it was so very unfavourable, that his consort Queen Anne, though she claimed it, yet never thought proper to exact it. In the earlier part of the reign of Charles the First, a writ for levying it was issued, at the suit of Queen Henrietta Maria (f) ; but the proceedings under that

(a) Pryn. *Aur. Reg.* 2.

(d) Lib. 2, ch. 26.

(b) *Case of Queen's Gold* (1607) 12 Rep. 21 ; 4 Inst. 358 ; Madox, *Hist. Exch.* 242.

(e) Pollock and Maitland, *History of Eng. Law* (2nd edn.) vol. i. p. 161.

(c) Madox, *Disceptat. Epis-tol.* 74 ; Pryn. *Aur. Reg. App.* 5.

(f) 19 Rym. *Fæd.* 721.

[writ were lukewarm and ineffective ; and at the Restoration, in 1660, it became, in effect, extinct.

Another antient perquisite belonging to the Queen Consort, mentioned by all our old writers (*a*), and for that reason only worthy of notice, is this, namely :—that on the taking of a whale on the coasts, which is a royal fish, it shall be divided between the King and the Queen ; the head only being the King's property, and the tail of it the Queen's.

But though the Queen Consort is in all respects a subject, yet in respect of the security of her life and person she is put on the same footing with the King. Thus it is equally treason under the Statute of Treasons, 1351, to compass or imagine the death of our Lady the King's companion, as of the King himself ; and to violate the Queen Consort amounts to the same high crime, as well in the person committing the act, as in the Queen herself, if consenting (*b*). And if the Queen, whether consort or dowager, be accused of any species of treason, she must be tried by the peers of Parliament ; as Queen Anne Boleyn was, in the twenty-eighth year of Henry the Eighth.

The husband of a Queen Regnant is her subject, as Prince George of Denmark was to Queen Anne,] and as Prince Albert, under the title of the Prince Consort, was to Queen Victoria. The position of Prince Albert as a subject was shown by the fact that, under his Act of Naturalization (3 & 4 Vict. (1840) c. 2), he was required to take the oaths of allegiance and supremacy.

[A 'Queen Dowager' is the widow of a King, and, as such, retains most of the privileges which belonged to her as Queen Consort ; though it is not high treason to conspire her death, or to violate her chastity, the succession to the Crown not being thereby endangered. Yet still, *pro dignitate regali*, no man may marry the

(*a*) Bracton, l. 3, cap. 3 ; cc. 45, 46.

Britton, cap. 17 ; Flet. l. 1, (b) 25 Edw. 3, st. 3, c. 2.

[Queen Dowager without special licence from the King, on pain of forfeiting his lands and goods ; for this was so enacted in Parliament, Sir Edward Coke tells us, in the sixth year of Henry the Sixth, though the statute is not extant, and the point seems doubtful (*a*). A Queen Dowager, alien born, was entitled by the common law to dower after the King's demise ; though, in general, the alien wife of a subject was not entitled to dower (*b*). Again, a Queen Dowager, if she marry a subject, doth not lose her regal dignity, as peeresses dowager, when commoners by birth, lose their peerage when they marry commoners ; and so Catherine, widow of King Henry the Fifth, though she married a private gentleman, Owen ap Meredith ap Theodore (commonly called Owen Tudor), yet maintained an action against the Bishop of Carlisle by the name of 'Catherine, Queen of England.' And the Queen Dowager of Navarre, who was married to Edmund Earl of Lancaster, brother to King Edward the First, maintained an action of dower, after the death of her second husband, by the name of Queen of Navarre (*c*).

The eldest son of the monarch, the heir apparent to the Crown, and also his royal consort, and the eldest daughter of the King, frequently created 'Princess 'Royal,' are all likewise peculiarly regarded by the laws ; for to compass or conspire the death of the former, or to violate the chastity of either of the latter, is as much treason under the Statute of Treasons, 1351, as to conspire the death of the King, or to violate the chastity of the Queen. The reason of this is, because the Prince of Wales is next in succession to the Crown, and to violate his wife might taint the blood royal with bastardy, and because the eldest daughter of the sovereign is also inheritable as sole heir to the Crown, on failure of issue male, and therefore more respected by the laws

(*a*) 2 Inst. 18 ; Riley, *Plac. Parl.* 72 ; Co. Litt. 31.

(*b*) Co. Litt. 31 b.

(*c*) 2 Inst. 50.



[than any of her younger sisters. The heir apparent to the Crown is usually made Prince of Wales (*a*) and Earl of Chester, by special creation and investiture, *i.e.*, by letters patent under the Great Seal; but, in virtue of being the monarch's eldest son, he is, by inheritance, Duke of Cornwall, without any new creation (*b*).

The younger sons and daughters of the King, and the other branches of the royal family, who are not in the immediate line of succession, are little further regarded by the antient laws, than to give them, to a certain degree, precedence before all peers and public officers as well ecclesiastical as temporal. This is done by the 31 Hen. 8 (1539) c. 10, which enacts that no person, except the King's children, shall presume to sit or have place at the side of the cloth of estate in the Parliament chamber, and that the great officers of state therein named shall have precedence above all dukes, except only such as shall happen to be the King's son, brother, uncle, 'nephew,' or brother's or sister's son. Under the description of the King's nephew, his grandson is held to be included (*c*); and therefore, when King George the Second created his grandson Edward, the second son of Frederick Prince of Wales deceased, Duke of York, and referred it to the House of Lords to settle

(*a*) This creation has not been confined to the heir apparent; for both Queen Mary and Queen Elizabeth were created by their father, Henry the Eighth, Princesses of Wales—each of them at the time (the latter after the illegitimation of Mary) being only heir *presumptive* to the Crown.

(*b*) *The Prince's Case* (1606) 8 Rep. 1; *Simpson v. Clayton* (1838) 4 Bing. N. C. 758. (As to the property of the monarch's

eldest son, in his duchy of Cornwall, see the Acts specified in App. II. to the Index to the Statutes; as to his mines there, see Cornwall Submarine Mines Act, 1858; and as to the limitation of suits by him in relation to the duchy, see also the Crown Suits Acts, 1769, and 1861, s. 2. As to the expenditure of the heir apparent, see the Heir Apparent Establishment Act, 1795.)

(*c*) 4 Inst. 362.

[his place and precedence, they certified that he ought to have place next to the Duke of Cumberland, the then King's youngest son, and that he might have a seat on the left hand of the cloth of estate (*a*). But when, on the accession of King George the Third, those royal personages ceased to take place as the children, and ranked only as the brothers and uncles, of the King, they left their seats on the side of the cloth of estate; so that when the Duke of Gloucester, His Majesty's second brother, took his seat in the House of Lords (*b*), he was placed on the upper end of the earls' bench, on which the dukes usually sit, next to His Royal Highness the Duke of York.

In the year 1718, upon a question referred to the judges by King George the First, it was resolved, that the education and care of the King's grandchildren, while minors, did belong of right to His Majesty, as King of this realm, even during their father's life; and, further, that the care and approbation of their marriages, when grown up, belonged to the King their grandfather.] The judges more recently concurred in the opinion, that this care and approbation extended also to the heir presumptive to the Crown; though to what other branches of the royal family the same did extend, they did not find precisely determined (*c*). The most frequent instances of the Crown's interposition, however, go no farther than nephews and nieces; although examples are not wanting of its reaching to more distant collaterals. And the alleged (*d*) statute of 6 Hen. 6 (1427), which prohibits the marriage of a Queen Dowager without the consent of the King, assigns this reason for it, namely, "because the disparagement of the Queen shall give greater

(*a*) Lords' Journ. 24th April, 1760.

(*c*) Lords' Journ. 28th Feb. 1772.

(*b*) Lords' Journ. 10th Jan. 1765.

(*d*) See *ante*, p. 569.

“ comfort and example to other ladies of estate, who  
 “ are of the blood royal, more lightly to disparage  
 “ themselves ” (a). Therefore, by the 28 Hen. 8  
 (1536) c. 18 (repealed by the 1 Edw. 6 (1547) c. 12),  
 it was made treason for any man to contract marriage  
 with the King’s children or reputed children, his sisters  
 or aunts *ex parte paternâ*, or the children of his  
 brothers or sisters. And now, by the Royal Marriage  
 Act, 1772 (b), no descendant of the body of King George  
 the Second, other than the issue of princesses married  
 into foreign families, is capable of contracting matri-  
 mony without the previous consent of the monarch,  
 signified under the Great Seal and declared in Council.  
 Any marriage contracted without such consent is void ;  
 and all persons solemnising, assisting at, or being  
 present at, any such prohibited marriage, incur the  
 penalties of the statutes of *præmunire*. Nevertheless,  
 any such descendant who is above the age of twenty-  
 five may, after a twelvemonth’s notice given to the  
 Privy Council, contract and enter into marriage with-  
 out the consent of the Crown ; unless both Houses of  
 Parliament shall, before the expiration of the year,  
 expressly declare their disapprobation of the intended  
 marriage. .

(a) Ril. *Plac. Parl.* 672.

(b) 12 Geo. 3, c. 11.

## CHAPTER V.

OF THE ROYAL COUNCILS AND OF THE OFFICERS OF  
STATE.

[THE King, in order to assist him in the discharge of his duties and in the maintenance of his dignity, hath assigned to him a diversity of councils.

1. The first and principal of these is the High Court of Parliament, whereof we have already treated at large (a).

2. Second, the peers of the realm are by their birth hereditary counsellors of the Crown, and may be called together by the King to impart their advice in matters of importance to the realm, either in time of Parliament, or, which hath been their principal use in times past, when there is no Parliament in being (b). It is laid down in our law books that peers are created for two reasons: (1) *ad consulendum*, (2) *ad defendendum regem*. On which account the law gives them certain great and high privileges, such as freedom from arrest in civil cases, even when no Parliament is sitting; because the law intends that they are always assisting the King with their counsel for the commonwealth, or keeping the realm in safety by their prowess and valour (c).

Instances of conventions of the peers, to advise the Crown, have been in former times very frequent, though now fallen into disuse by reason of the more regular meetings of Parliament. Sir Edward Coke (d) gives us an extract of a record, 5 Hen. 4 (1404),

(a) *Ante*, ch. i.

(b) Co. Litt. 110 a.

(c) *Earl of Shrewsbury's*

*Case* (1610) 9 Rep. 42 a.

(d) Co. Litt. 110 a.

[concerning an exchange of lands between the King and the Earl of Northumberland, wherein the value of each was agreed to be settled by advice of Parliament (if any should be called before the feast of Saint Lucia), or otherwise by advice of the grand council of peers, which the King promises to assemble before the said feast, in case no Parliament shall be called. Many other instances of this kind of meeting are to be found under our antient Kings, though the former mode of convoking them had been so long left off, that when King Charles the First, in 1640, issued out writs under the Great Seal to call a Great Council of all the peers of England to meet and attend His Majesty at York, previous to the meeting of the Long Parliament, the Earl of Clarendon mentions it as a new invention, not before heard of; that is, as he explains himself, so old that it had not been practised for some hundreds of years (*a*). But, though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet in cases of emergency our princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together; as was particularly the case with King James the Second, after the landing of the Prince of Orange, and with the Prince of Orange himself, before he summoned that Convention Parliament which afterwards called him to the throne.

Besides this general meeting, it is usually considered to be the right of each particular peer of the realm to demand an audience of the King, and to lay before him, with decency and respect, such matters as he shall judge of importance to the public weal. And, in the reign of Edward the Second, it was made an article of impeachment against the two Hugh Spencers, father and son, for which they were banished the

(*a*) *Hist. b. 2*, at p. 223 (ed. 1819).

[kingdom, “that they by their evil covin would not “suffer the great men of the realm, the King’s good “counsellors, to speak with or to come near the King ; “but only in the presence and hearing of the said “Hugh the father and Hugh the son, or one of them, “and at their will, and according to such things as “pleased them ” (a).

3. A third council belonging to the King is the council of his Judges for law matters (b). So that, when the King’s Council is mentioned generally, it must be understood *secundum subjectam materiam*. Accordingly when, by the Statute of Præmunire, 1392, it was made a high offence to import into this kingdom any papal bulls, or other processes from Rome, and the offenders were directed to be attached by their bodies, and brought before the King *and his Council* to answer for such offence, the “King’s “Council ” was understood to be the Judges of his courts of justice, the subject-matter being legal (c).] A trace of the ‘council of judges’ is to be found in the writ of attendance which the Judges receive at the commencement of each Parliament.

[4. But the principal council of the King is his Privy Council, which is generally called, by way of eminence, ‘the Council.’ And this, according to Sir Edward Coke’s description of it, is “a most noble, “honourable, and reverend assembly of such as the “King wills to be of his Privy Council in his court “or palace ” (d). The King’s will is the sole constituent

(a) 4 Inst. 53.

(b) Co. Litt. 110 a.

(c) 3 Inst. 125. Coke’s interpretation is extremely doubtful. In Coleridge’s *Blackstone* (vol. i. p. 229) it is suggested that the ‘council’ referred to was a court of very extensive jurisdiction, both civil and criminal,

and was the source from which the Court of Chancery and the Star Chamber sprang. Hale omits the ‘council of the ‘law’ from his enumeration of royal councils; his *concilium ordinarium* being different from Coke’s ‘council of the ‘law.’

(d) 4 Inst. 53.

[of a Privy Councillor, and regulates also the number of his Councillors. In antient times, the number of Privy Councillors was twelve or thereabouts; but afterwards it increased to so large a number, that it was found inconvenient for secrecy and dispatch. And therefore King Charles the Second, in 1679, limited it to thirty, of whom fifteen were to be the principal officers of state and Councillors *virtute officii*, and the other fifteen were ten lords and five commoners of the King's choosing; but since that time the number has been again much augmented, and now continues indefinite.]

No inconvenience, however, arises in modern times from this extension of the number; for, with the exception of such of them as are 'Cabinet Ministers,' the Privy Councillors are not now ordinarily summoned to advise the King. And the Cabinet Ministers (or Cabinet Council) are those Privy Councillors who, being more immediately honoured with the King's confidence, actually conduct the business of the government, and assemble for that purpose from time to time, as the public exigencies require. And it is this Cabinet Council, and not the Privy Council at large, that is always understood when mention is made of the King's 'administration.' But yet, strangely enough, the Cabinet is a body unknown to the law, and one whose members are never officially made known to the public, and whose proceedings are not recorded, except in communications to the King in the shape of a Cabinet Minute; while formal acts in the name of the Crown are still nominally done with the advice of the whole Privy Council. In fact, however, the meetings of the Privy Council at which this advice is given are purely formal (*a*); the real policy having in all cases been previously decided at a secret meeting of the Cabinet, or, in

(*a*) See *post*, p. 580.

minor matters, by the Minister in charge of the department affected.

The members of the Cabinet are usually the principal officers of state, namely, the Lord High Chancellor, the Prime Minister (*a*), the Lord President of the Council, the First Lord of the Treasury, the First Lord of the Admiralty, the Chancellor of the Exchequer, and the five Principal Secretaries of State (*b*), viz.—the Secretaries for the Home Department, for Foreign Affairs, for the Colonies, for the War Department (*c*), and for India (*d*). The Lord Privy Seal and the President of the Board of Trade have been members of all the most recent Cabinets ; but, as the Cabinet itself is not a legally recognised body, no one can be legally entitled to a place in it, and, though, in fact, government could not be carried on by a Cabinet which did not contain the Ministers responsible for the chief departments of state, there are many offices whose holders do or do not occupy seats in any particular Cabinet, according to the circumstances of the time. Among such offices are those of the Lord Lieutenant of Ireland, the Postmaster-General, and the Attorney-General.

It is, therefore, clear, that a large number of royal officials, among them many of great importance, are

(*a*) Until a short time ago, the Prime Minister, as well as the Cabinet, was not officially recognised by the Constitution. But by Royal Warrant dated 4th December, 1905, the office was definitely constituted, and its holder given precedence next after the Archbishop of York. Even now, however, the Prime Minister, though really the King's chief adviser, ranks after the Lord Chancellor.

(*b*) As to the office of Secretary of State, see *Entick* v.

*Carrington* (1765) 2 Wils. K. B. 275, at p. 289, and 19 St. Tr. 1030.

(*c*) The office of Secretary of State for War was created in 1854, on the occasion of the Crimean War. Before that time there was a Secretary *at War* (abolished by the Secretary at War Abolition Act, 1863) ; but he was not a Principal Secretary of State.

(*d*) The Government of India Act, 1858, s. 3.



not members of the Cabinet ; and, indeed, though some of these are members of the Privy Council, yet this is by no means true of all, even of those who are technically known as ‘Ministers of the Crown.’ The distinction between all these latter persons and those numerous royal officials who are described as ‘permanent’ is, that Ministers are ‘responsible’ for the acts of the Crown, in the sense that, if the House of Commons disapproves of those acts, they (the Ministers) must resign their offices, while the permanent officials, so long as they obey the royal instructions and behave properly, are not in fact liable to be deprived of their offices, though nearly all of them are, technically, subject to dismissal at any moment by the Crown (a).

It may, at first sight, seem somewhat unfair, that persons, who have done nothing legally or morally wrong, should be liable to loss of office merely because the House of Commons disapproves of a policy which they had no share in framing ; but, in fact, the holders of Ministerial offices outside the Cabinet are at least so closely connected with the administration, that it would be very inconvenient if they were allowed to remain in office after a change of the Cabinet. Moreover, the holders of such offices are very largely composed of members of the House of Commons, who are allowed, by virtue of the exception previously explained (b), to sit there, notwithstanding the general principle which excludes Crown officials from the House. They can, therefore, defend the policy of the Cabinet, and their own conduct, against the attack of hostile critics in the House ; and, above all, they look forward to the day when, as the reward of their dili-

(a) This position is expressed shortly by saying that such officials hold ‘during

‘pleasure,’ or *durante bene placito*.

(b) See *ante*, pp. 503–506.

gence, they too will enter the sacred circle of Cabinet Ministers.

The anomalous position of the Cabinet as an institution which, though of the highest importance, has no recognised place in the constitution, gives rise to a question of great though, perhaps, academic interest. Clearly, the King must be consulted before the appointment of any Minister, however humble his position; for every Minister is a Crown official, and every Crown official is, *ex hypothesi*, appointed by the Crown. Moreover, by long-established tradition, members of the Cabinet stand in a peculiar relation to the Crown; because they alone are entrusted with the vital secrets of state. When, for example, the King is absent from the seat of government, he is always attended by a Cabinet Minister; because a Cabinet Minister alone is capable of imparting confidences to the King, and of receiving confidences from the King. Obviously, therefore, the composition of the Cabinet is a matter of direct as well as indirect interest to the monarch; and it is believed that the personal approval of the King or Queen is an essential of admission to the Cabinet, as well as to office. Still, the Cabinet is not appointed by the Crown; and it is doubtful how far, in strict constitutional theory, the Crown can object to the inclusion of any Privy Councillor in the Cabinet. We must return, however, to the legal position of the Privy Council.

[Privy Councillors are made by the King's nomination, without either patent or grant. On taking the necessary oath or making the necessary affirmation (a), they immediately become Privy Councillors, with the title of 'Right Honourable,' during the life of the monarch that chooses them, subject to removal at his discretion.] There is no salary or allowance attached to the position of a Privy Councillor, as such.

(a) The Oaths Acts, 1888 and 1909.

The Privy Council at large does not, as we have said, in general assemble to advise on public affairs, but only on occasions of state and ceremony, such as the opening of a new reign. Formal meetings of the Council for the discharge of official business are, however, held about ten times a year; the summonses in these cases being confined to a small number of the members of the Council. At these meetings, the drafts of Orders in Council, dealing with a large variety of topics, are formally submitted for the approval of the King in Council, and are passed without discussion. Proclamations, for whatever purpose required—whether for summoning, proroguing, or dissolving Parliament or convocations, for declaring His Majesty's neutrality, for declaring days of fast, thanksgiving, or mourning, or Bank Holidays, or for any other purpose—are signed by the King at these meetings.

By the 16 Car. 1 (1640) c. 10, the Court of Star Chamber and the Court of Requests, both of which consisted of Privy Councillors, were dissolved; and it was declared illegal for the Council to take cognisance of any matter of property belonging to the subjects of this kingdom. Apart from its former inquisitorial powers, however, the Privy Council has, in certain cases, the judicial authority of a court of justice—that is to say, in appeals and other matters from the colonies and other British possessions, in appeals from colonial courts of admiralty (as defined by the Colonial Courts of Admiralty Act, 1890) (*a*), prize courts, and ecclesiastical courts (*b*), in certain matters arising under

(*a*) S. 2.

(*b*) As to the general jurisdiction of the Privy Council in these matters, see the Privy Council Appeals Act, 1832, and the Judicial Committee Acts, 1833 and 1843. Appeals in admiralty matters lie to

the King in Council from the colonial courts of admiralty and the courts acting as colonial courts of admiralty outside the King's dominions (*e.g.*, in Cyprus, Constantinople, China). The admiralty jurisdiction of the Privy

the Copyright Act, 1911 (*a*), and in applications by persons aggrieved by schemes prepared for the regulation of endowed schools (*b*).

[As to colonial causes, it is to be observed, that the jurisdiction of the Privy Council is both original and appellate. For whenever a question arises between two provinces out of the realm, as concerning the extent of their charters and the like, the King in Council exercises *original* jurisdiction therein, upon the principles of feudal sovereignty ; and so, likewise, when any person claims an island or a province, in the nature of a feudal principality, by grant from the King or his ancestors, the determination of that right belongs to the King in Council—as was the case of the Earl of Cardigan and others, as representatives of the Duke of Montague, with relation to the Island of St. Vincent, in 1764 (*c*).] But the jurisdiction of the Privy Council is, for the most part, *appellate* ; an appeal lying to it in the last resort from the judgment

Council in appeals from the former High Court of Admiralty (the jurisdiction of which is now vested in the Admiralty Division of the High Court of Justice) was transferred (except as to prize cases) by the Supreme Court of Judicature Act, 1873, s. 18, to the Court of Appeal ; from which an appeal lies to the House of Lords. As to appeals in prize cases (which lie to the King in Council from all prize courts whether at home or abroad), see the Naval Prize Act, 1864, and the Prize Courts Act, 1894. As to ecclesiastical appeals (which lie to the King in Council from ecclesiastical

courts both at home and abroad), see more particularly the Church Discipline Act, 1840, the Public Worship Regulation Act, 1874, and the Clergy Discipline Act, 1892.

(*a*) See Copyright Act, 1911, s. 4.

(*b*) Endowed Schools Acts, 1869 and 1873.

(*c*) For recent examples of the Crown in Council deciding inter-colonial differences of the kind referred to in the text, see the case of Pental Island (Order in Council, January, 1872), and the boundary disputes between Ontario and Manitoba in 1884, and between Victoria and South Australia, now pending.

or sentence of nearly every court of justice in the colonies, dependencies, and all other British possessions (including the Channel Islands and the Isle of Man) (a), as also from the judgment or sentence of the various courts established by virtue of the Foreign Jurisdiction Acts (b), e.g., the Supreme Court of China at Shanghai, the Supreme Court of Cyprus, the Supreme Consular Court for the dominions of the Sublime Ottoman Porte, and many others. Apart, however, from the case of courts established under the Foreign Jurisdiction Acts, no appeal lies to His Majesty in Council from the judgments of courts situate within countries over which no territorial sovereignty has been authoritatively asserted; even where the judicial administration of any such country has itself been established by the British Government (c).

Under the provisions of modern statutes, all the judicial authority of the Privy Council is now exercised by a select number of its members, called the Judicial Committee, who hear the allegations and proofs, and make their report thereon to His Majesty in Council; whose Order in Council finally determines the matter. It follows from the position of the Judicial Committee, as part of a secret council, that no differences of

(a) From the Supreme Court of Canada, the High Court of Australia (established by the Commonwealth of Australia Constitution Act, 1900) and the Supreme Court of South Africa, appeals can only be brought to His Majesty in Council by special leave of His Majesty. The prerogative to grant special leave to appeal is, as regards Australia, excluded in the cases defined in s. 74 of the Commonwealth Act. And

the South Africa Act, 1909 (s. 106), gives the South African Parliament power to make laws limiting the matters in respect of which leave to appeal may be asked. But such laws must be specially reserved for the signification of His Majesty's pleasure.

(b) Consolidated by the Foreign Jurisdiction Act, 1890.

(c) *Hemchand Devchand v. Azam Sakarlal* (1906) 33 Ind. App. 1.

opinion between its members are officially recorded ; and, in fact, the reasons given for the Committee's report (which is, in substance, a judgment) are usually delivered from writing by a single member. Under the provisions of the Judicial Committee Act, 1833 (*a*), the King may refer any matter to the Committee 'for hearing or consideration'; and of this power not infrequent use is made, in matters of a legal or quasi-legal character.

This Judicial Committee was constituted by the Judicial Committee Act, 1833, which has been amended by various subsequent statutes (*b*). At the present time, the Judicial Committee comprises (1) the Lord President of the Council, the Lord Keeper or First Commissioner of the Great Seal of Great Britain, all Privy Councillors who have held these offices, and two other persons, being Privy Councillors, appointed under sign manual (*c*) ; (2) one or two Judges of India or of His Majesty's dominions beyond the seas appointed to attend the sittings of the Judicial Committee (*d*) ; (3) six Lords of Appeal in Ordinary (*e*) ; (4) the present and past Lords Justices of Appeal who are members of the

(*a*) S. 4.

(*b*) The principal Act (the Judicial Committee Act, 1833) has been considerably altered and extended by the Judicial Committee Acts, 1843, 1844, 1871, 1881, and 1895, and by the Appellate Jurisdiction Acts, 1876, 1887, and 1908. Some of these Acts also contain regulations as to the manner of proceeding before the Judicial Committee, and particularly on appeals from India and the colonies. The general procedure before the

Judicial Committee is now, however, regulated by the Judicial Committee Rules, 1908.

(*c*) Act of 1833, s. 1.

(*d*) *Ibid.*, s. 30 ; Appellate Jurisdiction Act, 1887, s. 4. The two Indian or colonial members receive an allowance of 400*l.* a year each ; if only one is appointed, he draws both allowances.

(*e*) Appellate Jurisdiction Acts, 1876, ss. 6, 14 ; 1913, s. 1.

Privy Council (*a*) ; (5) members of the Privy Council who hold, or have held, high judicial office (*b*) ; (6) persons who are, or have been, Chief Justices or Judges of certain colonial courts, and are Privy Councillors, provided that the number of such persons does not exceed seven at any one time (*c*) ; and (7) persons who are, or have been, Chief Justices or Judges of any High Court in British India, and are Privy Councillors, provided that the number of such persons does not exceed two at any one time (*d*). By the Court of Chancery Act, 1851 (*e*), the quorum of the Judicial Committee is three.

Another important committee of the Privy Council is the committee appointed for the consideration of matters relating to trade and foreign plantations, commonly called the Board of Trade. The Board of Trade is charged with many miscellaneous duties ; among others, the supervision and regulation of railways (*f*), the superintendence of all matters relating to merchant ships and seamen (*g*), and the discharge of various functions under the Acts for the formation of piers and harbours (*h*), and under divers Acts relating to trading companies and other associations (*i*),

(*a*) Judicial Committee Act, 1881, s. 1.

(*b*) Appellate Jurisdiction Act, 1887, s. 3.

(*c*) Judicial Committee Amendment Act, 1895, s. 1 ; Appellate Jurisdiction Act, 1913, s. 3.

(*d*) Appellate Jurisdiction Act, 1908, s. 2. (The same Act (s. 1) gives power to appoint a Judge of any court in certain scheduled British possessions, to act as assessor on the hearing of an appeal from that possession.)

(*e*) S. 16.

(*f*) Railway and Canal Traffic Acts, 1873 to 1913 ; Railway Regulation Acts, 1840 to 1893.

(*g*) Merchant Shipping Act, 1894, ss. 713–730.

(*h*) General Pier and Harbour Act, 1861 ; General Pier and Harbour Act, 1861, Amendment Act, 1862 ; Harbours Transfer Acts, 1862 and 1865.

(*i*) Companies Act, 1908, ss. 109–111, 159, 160, 233–236, &c.

and to the copyright in designs (*a*), and the like (*b*). The Board is also charged with the carrying out of certain provisions relating to assurance companies contained in the Assurance Companies Act, 1909 (*c*); it has important duties (under the Conciliation Act, 1896) in regard to disputes between masters and workmen, and under the Trade Boards Act, 1909; it also controls proceedings under the Bankruptcy Acts, 1883 to 1913, and under the winding-up provisions of the Companies (Consolidation) Act, 1908. It administers the Electric Lighting Acts, 1882 to 1909; and it is charged with the determination and adjustment of standards of measure and weight under the Weights and Measures Acts, 1878 to 1904.

Like the Board of Trade, the Local Government Board, the Board of Education (*d*), and the Board of Agriculture and Fisheries (*e*), are in their origin committees of the Privy Council, though they have now become almost independent statutory bodies (*f*),

(*a*) Patents and Designs Act, 1907, ss. 49, 54, 82, 86. (The former jurisdiction of the Board in the matter of patents has now been transferred to the High Court (Patents and Designs Act, 1907, s. 18).)

(*b*) In addition to the duties mentioned in the text, the Board collects and arranges statistical returns exhibiting the extent of the revenues, commerce, manufactures, and other resources of the kingdom, and publishes reports containing a variety of useful details of a miscellaneous character. (See, *e.g.*, the Cotton Statistics Act, 1868.)

(*c*) These provisions are concerned mainly with the deposit of a guarantee fund,

and the publication of accounts. (See ss. 2–9 of the Act.)

(*d*) Formerly (till the Board of Education Act, 1899) the Education Committee, *i.e.*, the Committee of the Privy Council for receiving applications for aid from the parliamentary grants for the purpose of education.

(*e*) Board of Agriculture Act, 1889. Among the powers conferred by this Act on the Board were certain statutory powers formerly exercised by the Privy Council, *e.g.*, under the Contagious Diseases (Animals) Acts.

(*f*) Probably the Local Government Board is a purely statutory body, being



each under a single responsible Minister. Another committee, called the Universities Committee of the Privy Council (*a*), exercises certain powers with regard to the amendment or repeal of university statutes. Indeed, throughout its history, the Privy Council has been in the habit of doing most of its duties, which, apart from the duties of the Judicial Committee, are now of an administrative, or, at most, quasi-judicial character, by means of committees. Amongst other duties performed by the Privy Council, may be mentioned the granting of charters to, and the settlement of schemes for, municipal boroughs; the granting of charters to charitable, learned, scientific, and other societies; the annual appointing of sheriffs for the counties; the administration of the Midwives Act, 1902, and the Pharmacy Acts; the supervision of the General Medical Council under the Medical Acts, 1858 to 1886; and the control of the legislation of the Channel Islands and the Isle of Man.

4 [The dissolution of the Privy Council depends upon the King's pleasure; and he may, whenever he thinks proper, discharge the whole Council, and appoint another. By the common law also, the Privy Council was dissolved *ipso facto* by the King's demise; as deriving all its authority from him. But, to prevent the inconvenience of having no Council in being at the accession of a new prince, it was enacted, by the Succession to the Crown Act, 1707, that the Privy Council should continue for six months after the demise of the Crown, unless sooner determined

the creation of the Local Government Board Act, 1871. But in fact it took over a good many duties formerly confided to committees of the Privy Council.

(*a*) The Universities of Oxford and Cambridge Act, 1877.

A 'Scottish Universities Committee of the Privy Council' was created by the Universities (Scotland) Act, 1889. Amendments of the statutes of the younger universities require the approval of the Privy Council.

[by the successor.] But now, under the Demise of the Crown Act, 1901, since a Privy Councillor holds his office under the Crown, the demise of the Crown does not render any fresh appointment thereto necessary. The Lords of Appeal in Ordinary, who are paid members of the Judicial Committee, retain their offices during good behaviour.

## CHAPTER VI.

## OF THE ROYAL PREROGATIVE.

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[By the word 'prerogative,' we usually understand that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. And Finch describes the prerogative as being that law in case of the King, which is law in no case of the subject (*a*).] But this first definition has been called too vague; and it has been said that the prerogative may be more precisely defined as 'the discretionary authority of the executive' (*b*); *i.e.*, everything which the King, or his servants in his name, may do without the authority of an Act of Parliament.

We propose to consider the nature of the royal prerogative generally; pointing out, in the first place, the limits within which it is confined, and the safeguards which our political constitution has provided against its improper exercise.

[And first, we may remark, that there cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of examining, with decency and respect, the King's prerogative. For the glorious Queen Elizabeth herself made no scruple to direct her Parliaments to abstain from discoursing of matters of state; saying, that they "ought not to deal, to judge, or to meddle with her

(*a*) Finch, L. 85.

(*b*) Anson, *Law and Custom*,  
vol. ii. p. 2; and see Dicey,

*Law of the Constitution* (6th  
edn.), p. 368.

["prerogative royal" (a). And her successor, James the First, more than once laid it down in his speeches, that "as it is atheism and blasphemy in a creature "to dispute what the Deity may do, so it is presumption and sedition in a subject to dispute what "the King may do in the height of his power" (b). But, according to our antient constitution and laws, the limitation of the regal authority was a principle always recognised in England; and Sir Henry Finch, in the time of Charles the First, though he lays down the law of prerogative in very strong and emphatical terms, yet qualifies it with a general restriction in regard to the liberties of the people. The King, says he, hath a prerogative in all things that are not injurious to the subject; for in them all it must be remembered that the King's prerogative stretcheth not to the doing of any wrong—*nihil enim aliud potest rex, nisi id solum quod de jure potest.*] And the just limitation of the King's prerogative is indeed essential to the idea of political or civil liberty; wherefore it has been from time to time restrained by solemn compact or enactment, such as the Great Charter of 1215, the Confirmatio Cartarum in 1297, the Petition of Right in 1628, and the Bill of Rights in 1689. The last enactment, indeed, though it was largely concerned with matters which were indisputably illegal, yet dealt also with one or two points touching the prerogative of the Crown which are by no means free from doubt. It will be well, therefore, to refer to them somewhat in detail.

1. The free dispensation of justice by the ordinary tribunals.

[The law being the supreme arbiter of every man's life, liberty, and property, the courts must at all times be open to the subject, and the law be duly adminis-

(a) D'Ewes, *Journal*, 645.

(b) *King James's Works*, 531, 757.

[tered therein. The emphatical words of Magna Carta (a), spoken in the person of the King, who in judgment of law, says Sir E. Coke, is ever present and repeating them in all his courts, are these:—*nulli vendemus, nulli negabimus, aut differemus, rectum aut justitiam*; “and, therefore, every subject “for injury done to him by any other subject, be “he ecclesiastical or temporal, may take his remedy by “the law, and have justice and right for the injury “done to him, freely without sale, fully without any “denial, and speedily without delay” (b). And it would be endless to enumerate all the affirmative Acts of Parliament, wherein justice is directed to be done according to the law of the land.

It may be proper, however, to mention a few negative statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. Thus, it is ordained, by Magna Carta (c), that no freeman shall be outlawed—that is, put out of the protection and benefit of the laws—but according to the law of the land. By the 2 Edw. 3 (1328) c. 8, and 11 Rich. 2 (1387) c. 10, it is enacted that no commands or letters shall be sent, under the Great Seal, or the little seal, the signet, or privy seal, in disturbance of the law, or to disturb or delay common right; and though such commandments should come, the Judges shall not cease to do right—which is also, by the 20 Edw. 3 (1346) c. 1, made a part of their oath. And by the Bill of Rights, 1689, it is declared, that the pretended power of suspending laws, or of dispensing with laws, or with the execution of laws, as it had been of late exercised, by regal authority and without consent of Parliament, is illegal.

The method of proceeding in courts of justice cannot, any more than the substance of the law, be altered

(a) Cap. 40 (ed. Stubbs).

(c) Cap. 29.

(b) 2 Inst. 55.

[but by Parliament ; for if once these outworks were demolished, there would be an inlet to all manner of innovations in the body of the law itself. The King, it is true, may erect new courts of justice ; but then they must proceed according to the old-established forms of the common law (*a*). For which reason it is declared in the 16 Car. 1 (1640) c. 10 (*b*) (on the dissolution of the Court of Star Chamber) that neither His Majesty, nor his Privy Council, has any jurisdiction, power, or authority, by English bill, petition, articles, or libel (which were the courses of proceeding in the Star Chamber, borrowed from the civil law), or by any other arbitrary way whatsoever, to examine or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom ; but that the same ought to be tried and determined in the ordinary courts of justice, and by *course of law*.] Thus, one clause of the Bill of Rights was aimed especially at the prosecution in the King's Bench of matters properly cognisable only in Parliament, and another with the packing of juries with partial, corrupt, and unqualified persons (*c*). To the head now under consideration must also be referred the provisions which have been made to secure the dignity and political independence of the judges ; with which object in view, it was enacted, by the Act of Settlement, 1700 (*d*), that the judges' commissions should be made, not, as formerly, *durante bene placito*, but during good behaviour, *quamdiu se bene gesserint* ; but that it might be lawful to remove them on the address of both Houses of Parliament. And afterwards, by the 1 Geo. 3 (1761) c. 23, the judges were continued in their offices notwithstanding any *demise of the Crown* : and their full salaries were

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|---|----------------------|
| (a) As to the power of the Crown at the present day to create new courts, see Anson, <i>Law and Custom</i> , ii. ch. x. | s. vi. § 1.          |
|   | (b) S. 3.            |
|   | (c) Preamble, s. 11. |
|   | (d) S. 3 (7).        |

also absolutely secured to them during the continuance of their commissions.

2. The right of petitioning for the redress of grievances.

[In Russia, we are told, there was a law of the Czar Peter, that no subject might petition the Throne till he had first petitioned two different Ministers of State ; and in case he obtained justice from neither, he might then petition the prince, *but upon pain of death if found to be in the wrong* (a). But in England it is asserted by the solemn provisions of the same Bill of Rights to which we have so often referred, that “ it is the right of the subjects to petition the King, and “ all commitments and prosecutions for such petitioning “ are illegal.” It is true that, for the maintenance of order and prevention of coercion, the right of presenting petitions at certain times and in certain places is restricted (b) ; but it is clear that the right of petitioning may be exercised notwithstanding anything in the King’s prerogative.

The prerogatives of the King are now to be considered in detail. And these are either *direct*, or *incidental* ; the direct being such positive substantial parts of the royal character and authority, as spring from the King’s political person, without reference to any extrinsic circumstance, and the incidental being such as exempt the Crown from the general rules which are established for the rest of the community.

The substantive or direct prerogatives are divided into three kinds ; being such as regard, first, the King’s royal dignity ; second, his royal authority ; and, third, his royal income. These three prerogatives have been considered necessary to secure reverence to the King’s person, obedience to his commands, and an affluent supply for the ordinary expenses of his government.

(a) Montesquieu, *Esprit des Loix*, xii. 26.

(b) See *post*, bk. vi. ch. vi. (vol. iv. p. 173).

[In the present chapter we shall consider only the two first ; reserving the third, as well as the indirect or incidental prerogatives, for subsequent chapters.

First, then, of the ROYAL DIGNITY.—The law ascribes to the King, in his high political character, not only large powers and emoluments, which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature ; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government. These attributes constitute the royal dignity ; and three of them must here be specially noticed.

(1) The law ascribes to the King the attribute of *sovereignty*, or pre-eminence. He is said to have imperial dignity ; and in charters before the Conquest he is frequently styled *basileus* and *imperator* (a). His realm is declared to be an empire, and his crown imperial, by many Acts of Parliament ; amongst others 24 Hen. 8 (1533) c. 12, and 25 Hen. 8 (1534) c. 22. Formerly, there prevailed a notion, that an Emperor could do many things which a King could not do, and that all Kings were in some degree subordinate to the Emperor of Germany or Rome (b) ; the meaning therefore of the legislature, when it useth these terms of ‘ empire ’ and ‘ imperial,’ and applies them to the realm and Crown of England, is only to assert that our sovereign is equally supreme and independent within these his dominions as any emperor is in his empire.

(a) Seld. *Tit. of Hon.* 1, 2.

(b) *I.e.*, the ruler, or rather the titular head, of the Holy Roman Empire. [When Blackstone wrote, this curious institution was still in exist-

ence. It was formally dissolved in 1806. For a brilliant sketch of its history, see Bryce, *Holy Roman Empire*. —E. J.]



[and owes no kind of subjection to any other potentate upon earth.]

By virtue of this prerogative of sovereignty or pre-eminence, it was a maxim of our law, even while the now abolished doctrine of corruption of blood flourished in full vigour, that there could be no corruption of blood in the monarch; [for if the heir to the Crown were attainted of treason or felony, and afterwards the Crown descended to him, this *ipso facto* would purge the attainder (a). Therefore, when Henry the Seventh, who, as Earl of Richmond, stood attainted, came to the Crown, it was not thought necessary to pass an Act of Parliament to reverse this attainder; because, as Lord Bacon, in his history of that prince, informs us, it was agreed that the assumption of the Crown had at once purged the attainder. Neither can the King, as King, ever be, in judgment of the common law, a minor or under age; and therefore his assent to an Act of Parliament is good, even though he have not, in his natural capacity, attained the legal age of twenty-one (b). It hath, however, been usually thought prudent, when the heir apparent has been very young, to appoint a protector, guardian, or regent for a limited time; as was recently done on the accession of King George the Fifth, whose eldest son, the present Prince of Wales, was then only of the age of sixteen years (c). But the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law; that in the King is no minority, and therefore he hath no legal guardian.] And the appointment of a regent is only an expedient devised to meet a particular contingency.

[(2) A second attribute of dignity which the law ascribes to the King, in his political capacity, is, an absolute *perpetuity*. The King never dies. Henry,

(a) Finch, L. 82.

proëm.

(b) Co. Litt. 43; 2 Inst.

(c) Regency Act, 1910.

[Edward, or George may die; but the King survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity is vested, by act of law, and without any interregnum, in his heir; who is, *eo instanti*, King to all intents and purposes. And so tender is the law of even supposing a possibility of the death of the King, that his natural dissolution is generally called his 'demise'; an expression which signifies merely a transfer of property. Or, as is observed in Plowden (*a*), when we speak of the 'demise of the Crown,' we mean only that, in consequence of the disunion of the King's natural body from his body politic, the kingdom is transferred or demised to his successor.

(3) A third attribute of the royal dignity is *perfection*; it being an antient fundamental maxim of our law, that 'the King can do no wrong.' This maxim is not to be understood as if everything transacted by the government was of course just and lawful; its proper meaning is only this, that no crime or other misconduct must ever be imputed to the King personally. However tyrannical or arbitrary, therefore, may be the measures pursued or sanctioned by him, he is himself sacred from punishment of every description. For if any foreign jurisdiction had the power to punish him, as was formerly claimed by the Pope, the independence of this kingdom would be no more; and if the power to punish him were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the legislative power. Also, and upon the same principle, no action can be brought against the sovereign, even in civil matters; and indeed, his immunity (*b*), both from civil suit and from penal proceeding, follows from the circumstance that no

(*a*) *Hill v. Grange* (1556)  
Plowd. 177.

(*b*) *Tobin v. The Queen*  
(1864) 16 C. B. (N.S.) 310.

[court can have jurisdiction over him, all jurisdiction proceeding from the Crown itself (a).]

But while the King himself is, in a personal sense, incapable of doing wrong, his acts may in themselves be contrary to law and invalid. Thus, for example, his grants, when they are of that description, are avoided or set aside by the law ; but in such manner as to maintain the respect due to the Crown. [Thus, if the Crown should be induced to grant any franchise or privilege to a subject, and the grant should be contrary to reason, or in anywise prejudicial to the commonwealth or to any private person, the law will not suppose the King to have meant either an unwise or an injurious action, but declares that the King was deceived in his grant ; and such grant is thereupon rendered void, but merely upon the foundation of fraud or deception on the part of those agents whom the Crown has thought proper to employ. So, if any person has a just demand upon the King in respect of property, or arising out of contract (b), though he cannot bring an action against him,] he may petition him through the Secretary of State for the Home Department ; and (the petition being granted) the matter will be tried like an ordinary civil action in the High Court of Justice (c). [And though, in a sense, such redress is a matter of grace, and not to be had upon compulsion (d), yet a petition of right will not be refused capriciously ; and the prayer of it is grantable *ex debito justitiæ* (e), which is entirely consonant with what is laid down by the writers on natural law. “ A “ subject,” says Puffendorf, “ so long as he continues “ a subject, hath no way to *oblige* his prince to give

(a) Finch, L. 83.

of Right Act, 1860.

(b) *Windsor and Annapolis Rail. Co. v. The Queen* (1886) L. R. 11 App. Ca. 615.

(d) Finch, L. 255.

(e) See *Ryves v. Duke of Wellington* (1846) 9 Beav., at p. 600.

(c) As to the practice in such cases, see the Petition

[“him his due when he refuses it; though no wise prince will ever refuse to stand to a lawful contract. And if the prince gives the subject leave to enter an action against him upon such contract, in his own courts, the action itself proceeds rather upon natural equity, than upon the municipal laws” (a). For the end of such an action is not to *compel* the prince to observe the contract, but to *persuade* him.] Yet, as regards any cause of complaint which the subject may have against the Crown in respect of some personal injury of a private kind, being an injury unconnected with property, real or personal, this is not a proper subject for a petition; and, consequently, no remedy lies against the Crown in such a case, save under the express provisions of an Act of Parliament (b). But, of course, the unlawful command of the Crown is no defence to an action by the party injured against any person carrying out the Crown’s commands; and, therefore, as it is practically impossible for the King to carry out any unlawful course of action except through his agents or servants, any subject injured by such action has usually a sufficient personal remedy, by ordinary legal action, against any official actually concerned, directly or indirectly, in the commission of the wrong. Nor will it be open to such an official to plead either superior orders or the necessity of public affairs as an excuse for his illegal conduct; the law of England not recognising such kind of reasoning (c). It is to be observed, however, that to make a Crown official *legally* responsible for a course of action, it must be shown that he either actually

(a) *Law of N. & N.* bk. viii. ch. 10. various colonies.

(b) *Tobin v. The Queen* (1864) 16 C. B. (N.S.) 310. See Anson, *Law and Custom*, ii. ch. x. s. vi. § 2, for instances of waiver of the exemption in

(c) *Entick v. Carrington* (1765) 2 Wils. 275, 291. (There are certain exceptions for purely ministerial persons, carrying out the orders of their official superiors.)

took part in it or caused it to be done (a). For a Crown official is not, like an employer or master, liable for the acts of his official subordinates, because he does not appoint or pay them. All this is, of course, quite apart from the *political* responsibility of a Minister of the Crown, before alluded to (b); which is not based on legal grounds, but means simply liability to loss of office and reputation, if the House of Commons thinks he has behaved improperly.

[It is also to be observed, that, notwithstanding the personal perfection which the law attributes to the King, the constitution hath allowed a latitude of supposing the contrary, in respect of both Houses of Parliament; each of which in its turn hath exerted the right of remonstrating with, and complaining to, the King, even as to those acts of royalty which are most properly and personally his own, such as messages signed by himself, and speeches delivered from the throne. Yet, such is the reverence which is paid to the royal person, that, though the two Houses have an undoubted right to consider these acts of state in any light whatever, and accordingly to treat them in their addresses as proceeding personally from the prince, yet among themselves, to preserve the more perfect decency and for the greater freedom of debate, they usually suppose them to flow from the advice of his administration. The privilege of canvassing thus freely the personal acts of the sovereign belongs, however, to no individual, but is confined to those august assemblies; and the objections which it is desired to propose in Parliament, must be proposed with the utmost respect and deference. One member was sent to the Tower for suggesting, that His

(a) *Lane v. Cotton* (1701) [1898] 1 Ch. 73; *Bainbridge*  
1 Ld. Raym. 646; *Mostyn v. P. M. G.* [1906] 1 K. B.  
*v. Fabrigas* (1774) 1 Cowp. 178.  
161; *Raleigh v. Goschen* (b) See *ante*, p. 578.

[Majesty's answer to the Address of the Commons "contained high words to fright the members out "of their duty" (*a*); while another was similarly punished for saying, that a part of the King's speech "seemed rather to be calculated for the meridian of "Germany than Great Britain," and that the King was a stranger to our language and constitution (*b*).

If it be asked, what remedy is afforded to the subject for such public oppressions or acts of tyranny as have proceeded from the personal delinquency of the monarch himself, the answer is, that there is no more remedy than in the case, before supposed, of a personal injury inflicted by the sovereign on an individual; for to suppose a remedy in such a case, (that is to say, a compulsory remedy,) would be to suppose a superior coercive authority in some other hand, to correct the abuse. For all such abuses, therefore, whether they spring from the sovereign or from either House of Parliament, the law is manifestly unable to make provision; but if ever they unfortunately happen, the prudence of the times must provide new expedients upon the new emergencies.

Indeed, it is found by experience, that whenever unconstitutional oppressions, even of the sovereign power, advance with gigantic strides and threaten desolation to a state, mankind will not sacrifice their liberty by a scrupulous adherence to political maxims, which were originally established to preserve it; and, therefore, if any prince should endeavour to subvert the constitution by breaking the so-called 'original contract' between King and people, should violate the fundamental laws, and should withdraw himself out of the kingdom, it would be permissible to declare, that such a conjunction of circumstances would amount to an abdication, and the throne would

(*a*) Com. Journ. 18th Nov.  
1685.

(*b*) Com. Journ. 4th Dec.  
1717.

[be thereby vacant.] And it is probable that a similar treatment would be meted out to any sovereign authority, whether a monarch or an assembly, which made a really oppressive use of its legal powers.

[In further pursuance of the same principle, the law also determines that in the King there can be no negligence or *laches*. And so the maxim, *nullum tempus occurrit regi*, formerly prevailed on all occasions; no delay in resorting to his remedy being held to bar the King's right (*a*).] From this doctrine it followed, that not only the civil claims of the Crown received no prejudice by the lapse of time, but that criminal prosecutions also might be commenced at any distance of time from the commission of the offence (*b*). From a general point of view, all this is still law; but in modern times it has been largely qualified by statute, *e.g.*, by the Crown Suits Act, 1769 (as amended by the Crown Suits Act, 1861), by which the Crown is now barred from its civil right in suits relating to landed property after the lapse of sixty years, and by the Municipal Corporations Act, 1882, re-enacting provisions contained in the 32 Geo. 3 (1792) c. 58 (*c*), by which it is barred in informations for usurping corporate offices or franchises, after the lapse of six years, or, in *quo warranto* against a municipal corporation, after the lapse of one year. And though, speaking generally, no lapse of time will be a bar to a criminal prosecution, yet there are certain offences which can only be made the basis of such a proceeding within a limited time after their alleged commission. A notable example occurs in the Treason Act, 1695 (*d*), whereby an indictment for treason, except for an attempt to assassinate the King, must be found within three years after the commission of the act of treason.

(*a*) Co. Litt. 41 b, 90.

(*c*) Municipal Corporations

(*b*) *R. v. Thompson* (1851) Act, 1882, s. 73.

20 L. J. M. C. 183.

(*d*) S. 5.

[Second, of the ROYAL AUTHORITY.—This is a subject which involves a great variety of prerogatives, in the exertion whereof consists the executive part of government. By the British constitution, the executive power is wisely placed in a single hand ; for if it were placed in many hands, it would be subject to many wills, and these many wills, if disunited, would create a weakness or vacillation in the government. The King is therefore not only the chief, but properly the sole, magistrate of the nation ; all others acting only by commission from and in due subordination to him. The particular prerogatives incident to the executive vested in the King are the following :—

(1) The Crown has the sole power of sending ambassadors to foreign states, and of receiving ambassadors at home. For, with regard to foreign affairs, the Crown is the delegate or representative of the people ; and, it being impossible for the individuals of a state to transact the affairs of that state with another community equally numerous with themselves, therefore, in the King, as in a centre, all his people are united, and what is done by him, with regard to foreign powers, is, in effect, done by them.

This consideration naturally leads us to a brief inquiry concerning the rights, powers, duties, and privileges of ambassadors, as determined by the law of nations. For, owing to their position as representatives of foreign states, the municipal or national laws of the countries to which they are accredited are inapplicable to ambassadors ; though, if an ambassador grossly offends, or makes an ill use of his position, he may be sent home and accused before his master (*a*), who is bound either to do justice upon him, or else to avow himself the accomplice of his crimes. There is,

(*a*) As was done with Count A.D. 1716 (De Martens, Gyllenborg, the Swedish *Causes Célèbres*, i. p. 97). minister to Great Britain,



[however, some dispute among writers on international law, whether this exemption of ambassadors extends to all crimes, as well natural as positive, or whether it extends only to *mala prohibita*, such as coining, and not to *mala in se*, such as murder (*a*). Our law seems to have formerly allowed the exemption in the restricted sense only ; for it has been held, that though an ambassador is privileged by the law of nations, yet, by that law, if he commits any offence against the law of reason and nature, he shall lose his privilege (*b*). Consequently, if an ambassador conspires the death of the King in whose land he is, he may, by our law, be condemned and executed for treason ; though if he commits any other species of offence, he must be sent to his own country (*c*). And these positions seem to be in full accordance with reason. But the general practice of this country now is to act upon the sentiments of the learned Grotius : that the general security of ambassadors is of more importance than the punishment of some particular crime (*d*). And therefore, since the middle of the seventeenth century, few, if any, examples have happened where an ambassador has been punished for any offence, however atrocious in its nature (*e*).

In respect to civil suits, neither an ambassador, nor any of his train, can be proceeded against for any debt or contract in the courts of the kingdom to which he

(*a*) Van Leeuwen in Dig. 50, 7, 17 ; Barbeyrac's Puff. 1, 8, ch. ix. ss. 9 and 17 ; Van Bynkershoek, *De Foro Legator*. cc. 17-19.

(*b*) *R. v. Marsh* (1615) 3 Bulstr. 27 ; 4 Inst. 153.

(*c*) *R. v. Owen* (1616) 1 Roll. Rep. 185.

(*d*) "*Securitas legatorum, utilitati quæ ex pœnâ est*

*præponderat.*"—(*De Jure B. et P.* l. 2, ch. xviii. s. 4.)

(*e*) In the year 1653 (during the protectorate of Cromwell) Don Pantaleone Sa, the brother and secretary of the Portuguese ambassador, was tried, convicted, and executed in London for an atrocious murder (Phillimore, *Inter. Law*, ii. 211).

[is accredited, *i.e.*, in which he is sent to reside (*a*). But few, if any, cases had arisen, wherein the privilege with regard to civil suits was either claimed or disputed, previous to the reign of Queen Anne; when an ambassador from the Czar Peter of Muscovy was actually arrested and taken out of his coach in London, in 1708, for debts which he had there contracted. Instead of applying to be discharged upon his privilege, he gave bail to the action, and the next day complained to the Queen. The Czar resented this affront very highly, and demanded that the sheriff of Middlesex, and all others concerned in the arrest, should be punished with instant death (*b*); but Queen Anne directed her secretary to inform him, that she could inflict no punishment upon any, the meanest, of her subjects, unless warranted by the law of the land (*c*). A Bill was, however, brought into Parliament, and afterwards passed into law, to prevent the like occurrences for the future (*d*).

The statute recites the arrest which had “been made “in contempt of the protection granted by Her Majesty “and in prejudice of the rights and privileges which “ambassadors and other public ministers have at all “times by the law of nations been possessed of,” and enacts that, for the future, all writs and process whereby the person of any ambassador, or of his domestic servant, may be arrested, or his goods distrained or

(*a*) A ‘secretary of legation,’ acting in the absence of the ambassador as *chargé d’affaires*, is protected in the same manner as the ambassador himself; and an ambassador does not lose his privilege even by engaging in mercantile transactions (*Taylor v. Best* (1854) 14 C. B. 487; *A.-G. v. Kent* (1862) 1 H. & C. 30; *Magdalena*

*Steam Navigation Co. v. Martin* (1859) 2 El. & El. at p. 109).

(*b*) Com. Journ. 17th September, 1708; Boyer, *Annals of Queen Anne*.

(*c*) Com. Journ. 11th January, 1709; Boyer, *Annals of Queen Anne*; *Un. Mod. Hist.* xxxv. 454.

(*d*) Diplomatic Privileges Act, 1708.

[seized, shall be utterly null and void, and that all persons prosecuting, soliciting, or executing such process, are to be deemed violators of the law of nations, and disturbers of the public repose, and are to suffer such penalties and corporal punishment as the Lord Chancellor and the two Chief Justices, or any two of them, shall think fit. But no trader, within the description of the bankrupt laws, who shall be in the service of the ambassador, is to be privileged or protected by the Act; and no one is to be punished for arresting the servant of an ambassador, unless the name of the servant shall have been registered with the Secretary of State, and by him transmitted to the sheriffs of London and Middlesex (a). The privileges of ambassadors and others, as so declared by that Act, are thus expressly made part of the law of the land, and are allowed as such in the courts of law (b); and one or two others, e.g., exemption from payment of Land Tax, have since been granted to ambassadors by Act of Parliament (c).

(2) It is also the King's prerogative to make treaties, leagues, and alliances with foreign states and princes (d). For by the law of nations it is essential to the goodness of a treaty that it be made by the sovereign power (e); and in England the sovereign power, *quoad hoc*, is vested in the person of the King. Whatever contracts therefore he engages in with foreign states, no other power in the kingdom can legally delay, resist, or annul; yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution hath here interposed a check by the means of

(a) *Seacombe v. Bowlney* (1743) 1 Wils. K. B. 20.

(b) *Viveash v. Becker* (1814) 3 M. & S. 284; *Musurus Bey v. Gaddan* [1894] 1 Q. B. 533; 2 Q. B. 352. (As to waiver of privilege, see *Re Republic of Bolivia* (1913) 30 T. L. R. 78.)

(c) Land Tax Perpetuation Act, 1798, s. 46.

(d) Com. Dig. *Prerogative*, B. 3; Chitty, *Commercial Law*, i. 38, 615.

(e) Puff. *L. of N.* bk. 8, ch. 9, s. 6.

[parliamentary impeachment, for the punishment of such Ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation, and the minor punishment of loss of office in the event of indiscretion or unwisdom leading to similar results. Moreover, no treaty, however binding, can affect the private rights of British subjects derived from the national law; unless it is made under the express authority of an Act of Parliament. Wherefore, when any treaty contemplates such an alteration in our law, it is necessary to obtain an Act of Parliament for its execution in this country (*a*). A typical example of this necessity is the group of statutes known as the International Copyright Acts (*b*), now repealed by, but incorporated into, the Copyright Act, 1911.

(3) Upon the same principle, the King has also the prerogative of making war and peace (*c*); for, by the law of nations, the right of making war, which by nature subsisted in every individual, has become vested in the sovereign power of each community (*d*). And it would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him, against his will, in a state of war. Whatever hostilities therefore may be committed by private citizens, the state ought not to be affected thereby, unless it should justify their proceedings; and such volunteers in violence, being and remaining unauthorised, are not ranked among enemies, but among pirates and robbers. And the reason given by Grotius, why, according to the law of

(*a*) *The Parlement Belge* (1879) 4 P. D. 129; 5 P. D. 197 (where Blackstone's statement as to the prerogative in this respect is criticised); *Walker v. Batrd* [1892] A. C. 491.

(*b*) Of 1844, 1852, 1875, and 1886.

(*c*) Com. Dig. *Prerogative*, C. 1, 2, 3; Bac. Ab. *Prerog.* D. 4.

(*d*) Puff. b. 8, cap. 6, s. 8.

[nations, a denunciation of war ought always to precede the commencement of hostilities, is not so much that the enemy may be put upon his guard, but that it may be certainly clear, that the war is not undertaken by private persons, but by the will of the whole community (a). Accordingly, with us in England, in order to make a war completely effectual, it was formerly necessary that it should be publicly declared and duly proclaimed by the King's authority ; but the modern practice is by no means uniform. And in whatever body the right resides of beginning a national war, in that body also must reside the right of ending it, or the power of making peace. But the check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, and the necessity under which the Ministers of the Crown are of retaining the support of the majority in the House of Commons, are in general sufficient to restrain them from advising a wanton or injurious exercise of this great prerogative.] And, indeed, under modern conditions, no war could be carried on by this country, unless with the active support of Parliament.

[(4) But, as delay in declaring war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respects armed the subject with powers to impel the prerogative ; by authorising the issue by the Crown, upon due demand made, of letters of *marque and reprisal*. The prerogative of granting such letters is nearly related to, and plainly derived from, the larger prerogative of making war ; and the issue of them is in general the mere precursor of a formal denunciation of war. This expedient is justifiable by the law of nations whenever the subjects of one state are oppressed and injured by those of another, and justice is denied

(a) *De Jure B. et P.* l. 3, c. 3, s. 11.

[them by that state to which the oppressor belongs (*a*). In such a case, letters of marque and reprisal—words in themselves synonymous and signifying a taking in return—may be obtained ; in order to seize, wherever they be found, the bodies or goods of subjects of the offending state, until satisfaction be made. This custom of reprisal seems dictated by Nature herself ; the sovereign power merely intervening in order to determine when the reprisals may be made. And by the 4 Hen. 5 (1416) c. 7, if any subjects of the realm are oppressed by any foreigners in time of truce, the King may grant letters of marque in due form, to all that feel themselves grieved, whereby the aggrieved party may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber or pirate.] But the term ‘ letters of marque ’ is now used in a somewhat different sense, as applying to the commissions from the King, or from the Lords of the Admiralty, as his agents, acting under divers statutes ; whereby, in time of actual war, in order to encourage merchants and others to fit out privateers or armed ships, the prizes captured by the owners of such ships are made divisible between such owners, including the captains and the crews, instead of belonging to the Crown as *droits* of admiralty (*b*). In the Crimean War, although no ‘ letters of marque ’ were issued to privateers, ‘ general reprisals ’ were granted against the ships, vessels, and goods of the enemy ; in order to give the benefit of the prizes taken by Her Majesty’s ships to the captors of those prizes. But, though not legally abolished (for not all states have agreed to its abolition), privateering has fallen practically into disuse since it was condemned by the Declaration of Paris in 1856.

(*a*) *De Jure B. et P.* 1. 3, pl. 22 ; *Nicol v. Goodall* (1804) c. 2, ss. 4, 5. 10 Ves. 155.

(*b*) *Vin. Abr. Prerog.* N. a,

[(5) Upon exactly the same reason stands the prerogative of granting *safe-conducts*; without which, by the law of nations, no member of one society has a right to intrude into another (a). And therefore Puffendorff very justly resolves (b), that it is left in the power of all states to take such measures about the admission of strangers, not being shipwrecked people, as they think convenient. By our laws, great tenderness is shown, not only to foreigners in distress, but with regard also to the admission of strangers who come spontaneously; for, so long as their own nation continues at peace with ours, and they themselves behave peaceably, they are under the King's protection,] and are, generally speaking, granted the right of residence here, with other large privileges (c). [But no subject of a nation at war with us can come into this realm, or travel himself upon the high seas, or send his goods and merchandise from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct; which by divers antient statutes were to be granted under the great seal and enrolled in Chancery, or else they were of no effect (d).] Passports under the hand of a Secretary of State, or licences from his ambassadors abroad, are, however, now more usually obtained, and are allowed to be of equal validity.

The law of England, indeed, a commercial country, has ever paid a very particular regard to foreign merchants. Thus, by Magna Carta (e), if a war breaks out between their country and ours, they shall, if in England, be attached without harm of body or goods, till the King or his Chief Justiciary be informed how our merchants in their country are treated; and if our

(a) Com. Dig. *Prerogative*, 545-546.

B. 5.

(b) *Law of N. & N.* bk. iii. ch. iii. s. 9.

(c) For the qualifications to this statement, see *ante*, pp.

(d) 15 Hen. 6 (1436) c. 3;

18 Hen. 6 (1439) c. 8; 20 Hen. 6 (1441) c. 1; *The Hoop*

(1799) 1 C. Rob. 196.

(e) Cap. 41 (ed. Stubbs),

merchants be well entreated there, theirs shall be likewise with us. This rule seems, indeed, to have been a common rule of equity among all the northern nations (a). But it is somewhat extraordinary that it should have found a place in Magna Carta, a mere interior treaty between the King and his natural-born subjects; which occasions the learned Montesquieu to remark with a degree of admiration, that “the English have made the protection of foreign merchants one of the articles of their national liberty” (b). But, indeed, this provision well justifies another observation which he has made, that “the English know better than any other people upon earth, how to value at the same time these three great advantages, religion, commerce, and liberty” (c).

[(6) The monarch, as being a constituent part of the supreme legislative power, has, though it is long since the power has been exercised, the prerogative of rejecting, or, more strictly, refusing to join in, such proposed Parliamentary provisions as he judges improper to be passed. The expediency of this particular prerogative has been before evinced at large (d); we shall, therefore, only mention here, that the Crown is not in general bound by Act of Parliament, unless named therein by special and particular words (e)—the most general words that can be devised not affecting the King, so as to restrain or diminish in the least any of his rights or interests (f). It would, indeed, be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed, without its own express consent, by constructions and implications of the

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| (a) Stiern. <i>De Jure Sueon.</i>    | E. 5.                                   |
| 1, 3, c. 4.                          | (f) <i>Magdalen College Case</i>        |
| (b) <i>Esprit des Loix</i> , 20, 14. | (1615) 11 Rep. 66 b; <i>In re</i>       |
| (c) <i>Ibid.</i> 20, 7.              | <i>Henley &amp; Co.</i> (1878) 9 Ch. D. |
| (d) See <i>ante</i> , p. 526.        | 469; <i>Re Oriental Bank</i> (1884)     |
| (e) <i>Bac. Abr. Prerogative</i> ,   | 28 Ch. D. 643.                          |



[subject. But where an Act of Parliament is expressly made for the preservation of public rights and suppression of public wrongs, and does not interfere with any established rights of the Crown, it is binding as well upon the ruler as upon the subject (*a*); and the King may take the benefit of any Act, though he be not specially named therein (*b*).

(7) The King is considered, in the next place, as the first in military command within the kingdom; and, in this capacity, he has the sole power of raising and regulating fleets and armies. This prerogative was solemnly declared, by the 13 Car. 2, st. 1 (1661) c. 6, to be in the King alone; the sole supreme government and command of the militia within all His Majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, being thereby recognised as the undoubted right of His Majesty, and his royal predecessors, Kings and Queens of England. This statute, it will be observed, extends not only to fleets and armies, but also to forts, and other places of strength within the realm; for the sole prerogative, as well of erecting as of manning and governing these, belongs to the King in his capacity of general of the kingdom (*c*). And this prerogative has, in modern times, been aided by divers statutes (*d*). By the old common law, moreover, the lands of private individuals were, in general, subject to a tax, for building of castles wherever the King thought proper. This was indeed one of the three things, from contributing to the performance of which no lands were exempted; being one of the three obligations which

(*a*) *Magdalen College Case*,  
*ubi sup.*

(*b*) *Case of Fine Levied by  
the King* (1604) 7 Rep. 32.

(*c*) 2 Inst. 30; Com. Dig.  
*Prerogative*, C. 4.

(*d*) See the National De-

fence Act, 1888, the Imperial  
Defence Act, 1888, the Military  
Lands Acts, 1892 and  
1897, the Military Works  
Acts, 1897 and 1903, and the  
Naval Works Act, 1905.

[constituted the *trinoda necessitas* : sc. *pontis reparatio, arcis constructio, et expeditio contra hostem* (a). But, though the King, acting through his Ministers, will undoubtedly be supreme commander of any forces which may be lawfully raised in or by the country, yet it must be remembered that, in time of peace, he cannot lawfully raise or keep a standing army within the kingdom without the consent of Parliament (b), and that, whether in time of peace or in time of war, the issue of commissions for proceeding by martial law, unless under the express provisions of an Act of Parliament, is illegal (c).

It is partly upon the same and partly upon a fiscal foundation, in order to secure his marine revenue, that the King has the prerogative of appointing *ports* and *havens* ; that is, such places as he in his wisdom sees proper, for persons and merchandise to pass into and out of the realm (d). By the feudal law, all navigable rivers and havens were computed among the *regalia*, and were subject to the sovereign of the state (e). In England, it hath always been holden, that the King is lord of the whole shore (f), and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm (g) ; for, as early as the reign of King John, we find that ships were seized by the King's officers for putting in at a place that was not a legal port (h). Legal ports were undoubtedly at first assigned by the Crown ; since to each of them a court of *portmote* was incident, the jurisdiction of which must have flowed from the

(a) Cowell, *Interpr. tit. Castellorum Operatio* ; Seld. *Jan. Ang.* 1, 42.

(b) Bill of Rights, 1689.

(c) Petition of Right, 1628, *ad fin.*

(d) Hale, *De Portibus*

*Maris.*

(e) 2 Feud. t. 26 ; Craig, 1, 15, 15.

(f) F. N. B. 113.

(g) Dav. 9, 56.

(h) Madox, *Hist. Exch.* 530.

[royal authority (a). The *great ports* of the sea are also referred to, as well known and established, in the 4 Hen. 4 (1402) c. 20, which prohibits the landing elsewhere under pain of confiscation; and the 1 Eliz. (1558) c. 11, recites that the franchise of lading and discharging had been frequently granted by the Crown.

But though the King had a power of granting the franchise of havens and ports, yet he had not the power of narrowing and confining the limits of such ports and havens when once established; but any person had a right to load or discharge his merchandise in any part of the haven, whereby the revenue derived from the customs was much impaired and diminished by fraudulent landings in obscure and private corners. This abuse occasioned divers statutes to be passed, enabling the Crown to ascertain the limits of ports, and to assign proper quays therein for the exclusive landing and loading of merchandise (b);] and this duty, as well as that of appointing ports and sub-ports, and of declaring their limits, is now confided, by the Customs Consolidation Act, 1876 (c), to the Commissioners of His Majesty's Treasury.

[The erection of beacons, lighthouses, and sea-marks is also incident to this branch of the royal prerogative; whereof the first were antiently used in order to alarm the country in case of the approach of an enemy, and all are signally useful in guarding and preserving vessels at sea, by night as well as by day. And for this purpose the King hath exclusive power,

(a) 4 Inst. 148. (This argument is exceedingly doubtful.—E. J.)

(b) 1 Eliz. (1558) c. 11, and 14 Car. 2 (1662) c. 11; both repealed by 6 Geo. 4 (1825) c. 105.

(c) S. 11. By the Customs Consolidation Act, 1876, the Commissioners may appoint 'warehousing ports' (s. 12), and 'sufferance wharves' (s. 14), for the purpose of the customs.

[by commission under his Great Seal (*a*), to cause beacons, lighthouses, and sea-marks to be erected in fit and convenient places (*b*), as well upon the lands of the subject, as upon the demesnes of the Crown (*c*).] A power, however, of the same general nature is now, by statute, vested also in certain bodies subordinate to the Crown ; viz., in the Trinity House, for England and Wales and the Channel Islands ; and for Scotland, the Isle of Man, and Ireland, respectively, in other authorities (*d*). But since the regulation of beacons, lighthouses, and sea-marks falls chiefly under the jurisdiction of these last-mentioned bodies, the subject shall be postponed until we arrive at that division of the work in which some notice is taken of the Trinity House and of the other lighthouse authorities (*e*).

[To the same head belongs also the right which the King has, whenever he sees proper, of confining his subjects within the realm, or of recalling them when beyond the seas. For although, by the common law, every man may go out of the realm for whatsoever cause he pleaseth, without obtaining the King's leave (a liberty which was expressly declared in King John's Great Charter, though left out in that of Henry the Third (*f*)), yet, inasmuch as every man ought of right to defend the King and his realm, the King at his pleasure may by his writ command him that he go not beyond the seas or out of the realm without licence. And in such case, he shall be punished if he disobey the writ. And there were in old days some persons who, by reason of their stations, were under a perpetual prohibition of going abroad without licence obtained ;

(*a*) 3 Inst. 204 ; 4 Inst. 148. 1894, Part II.

(*b*) Rot. Claus. 1 Ric. 2, (e) *Vide post*, pt. iii. ch. x.  
m. 42 ; Prynne on 4 Inst. 136. (vol. iii. p. 181).

(*c*) 4 Inst. 148, 149.

(*f*) F. N. B. 83.

(*d*) Merchant Shipping Act,

[among whom were reckoned all peers, on account of their being councillors of the Crown, all knights, who were bound to defend the kingdom from invasions, all ecclesiastics, who were expressly confined by the fourth chapter of the Constitutions of Clarendon, on account of their attachment, in the times of popery, to the see of Rome, and all archers and other artificers, lest they should instruct foreigners to rival us in their several trades and manufactures (a). But, at the present day, everybody (other than the holder of the Great Seal and officers in the army) has, or at least assumes, the liberty of going abroad when he pleases, and without licence ; and the writ *ne exeat regno* is no longer resorted to for state purposes. It is now used only to prevent one of the parties to an action from withdrawing his person or property from the jurisdiction of the Court by going abroad ; unless he shall first give security for the satisfaction of such claim as the other party shall establish (b). But possibly, even at the present day, disobedience to a writ of *ne exeat regno* would be a high contempt of the royal prerogative ; and it is said, that, in such case, the offender's lands shall be seized till he return, and that he is then liable to fine and imprisonment (c).

(8) Another capacity in which the King is considered in domestic affairs, is as the fountain of justice, and general conservator of the peace of the kingdom (d). By the fountain of justice, the law does not mean that the King is the *author* or *original*, but only the *distributor*, and as it were the steward of the public, to dispense justice to whom it is due.] This power of judicature has been usually committed to certain select magistrates ; but, in England, these magistrates are

(a) Britton, ch. 123.

(b) *Ex parte Brunker* (1734) 3 P. Wms. 312 ; *Dick v. Swinton* (1813) 1 V. & B. 371 ; *Goodman v. Sayers* (1821) 5 Madd. 471 ; *Sobey v. Sobey*

(1873) L. R. 15 Eq. 200 ; *Drover v. Beyer* (1879) 13 Ch. D. 242.

(c) 1 Hawk. P. C. 22.

(d) Bac. Abr. *Prerog.* D. ; Com. Dig. *Prerog.* D. 28.

still considered as in some sense the substitutes of the Crown, the King himself remaining, according to the prerogative now under consideration, the fountain of that justice which they administer. Hence it is, that the jurisdiction of all secular courts is now either mediately or immediately derived from the Crown ; the magistrates or judges who preside therein are all appointed by the authority of the Crown ; and the proceedings run generally in the King's name, pass under his seal, and are executed by his officers. [Indeed, it is probable, that in very early times the King in person often heard and determined causes between party and party ; but at present, and by consequence of the long and uniform usage of many ages, our monarchs have delegated their whole judicial power to the judges of their several courts (*a*), and (as Sir Edward Coke declared in 1607) may no longer interfere with the regular conduct of business therein.

In regard to criminal proceedings, it would, indeed, be absurd if the King personally intervened ; because, in regard to these, he appears in another capacity, that of *prosecutor*. All criminal offences are either against the King's peace or against his Crown and dignity ; and it was formerly necessary in every indictment so to describe them. For though, in their consequences, they generally seem to be rather offences against the kingdom than against the King, yet as the public has delegated all its powers and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to those powers and breaches of those rights are immediately offences against that magistrate. And this notion was carried so far in the old Gothic constitution (wherein the King was bound by his coronation oath to conserve the peace), that, in case of any forcible injury offered to the person of a fellow-subject, the offender was accused of a kind of perjury, in

(*a*) 2 Hawk. P. C. 1.

[having violated the King's coronation oath (a). Hence arises also another branch of the prerogative, that of *pardoning* offences ; for it is reasonable that he only who is injured should have the power of forgiving. Of prosecutions and pardons, however, more will be said hereafter ; they are mentioned here, only to show the constitutional grounds of this power of the Crown, and how regularly connected all the links are, in this vast chain of prerogative.

A consequence of the particular prerogative now under consideration is the legal *ubiquity* of the King. His Majesty, in the eye of the law, is always present in all his courts ; though he cannot personally distribute justice therein (b). From this ubiquity, it follows that the King can never be *nonsuited* (c) ; though the Attorney-General may enter a *nolle prosequi*, which has much the same effect. For the same reason also, in the forms of legal proceedings, the King is never said to appear by attorney, as other men may do ; for, in contemplation of the law, he is always present in court (d).

From the same original, of the King's being the fountain of justice, we may also deduce the prerogative of issuing *proclamations*, which is vested in him alone. These royal proclamations have a binding force ; but only when they are grounded upon and enforce the laws of the realm (e). For though the making of laws is entirely the work of the legislative branch of the supreme power, yet the manner, time, and circumstances of putting those laws in execution, must frequently be left to the discretion of the executive magistrate. And therefore it is that royal proclama-

(a) Stiern. *De Jure Sueon.*  
l. 3, c. 3.

(b) Fortesc. ch. viii. ; 2 Inst.  
186.

(c) Co. Litt. 139 b.

(d) Finch, L. 81.

(e) 3 Inst. 162 ; *Case of*  
*Proclamations* (1610) 12 Rep.  
74.

[tions are binding upon the subject, where, neither contradicting the old laws, nor tending to establish new ones, they enforce only the execution of such laws as are already in being. For example, the established law is, that the King may prohibit any of his subjects from leaving the realm; a proclamation, therefore, forbidding this in general, for three weeks, by laying an embargo upon all shipping in time of war, has been held equally binding with an Act of Parliament (*a*). But a proclamation laying an embargo, in time of peace, upon all vessels laden with wheat, contrary to the 22 & 23 Car. 2 (1671) c. 13, would be an illegal proclamation (*b*).

Many royal proclamations are, indeed, especially in modern times, directly authorised by Acts of Parliament (*c*); in which case they have all the force of Parliamentary statutes. And it was once enacted by the Statute of Proclamations (31 Hen. 8 (1539) c. 8), that all the King's proclamations made with the assent of his Council should have the force of Acts of Parliament. But this statute, which, as being calculated to introduce the most despotic tyranny, must have proved fatal to the liberties of this kingdom, was luckily repealed in the minority of his successor, about eight years after (*d*).]

(9) The King is also, as *parens patriae*, invested with a kind of guardianship over various classes of persons who, from their legal disability, stand in need of protection (*e*). This branch of the prerogative applies specially to *infants*, who have been sufficiently con-

(*a*) *Sands v. Child* (1693) 4 Mod. 177, 179 (admitted).

(*b*) 7 Geo. 3 (1767) c. 7. This Act, as also the Act of Charles, is now repealed.

(*c*) The issue of royal proclamations is, indeed, ex-

pressly regulated by statute (Crown Office Act, 1877, s. 3 (*e*)).

(*d*) 1 Edw. 6 (1547) c. 12.

(*e*) *De Manneville v. De Manneville* (1804) 10 Ves. 52.



sidered already (*a*), and also to *idiots* and *lunatics*. These we will now consider.

[An *idiot* (or natural fool) is one that hath had no understanding from his nativity, and therefore is by law presumed never likely to attain any ; but none is to be held such who hath any glimmering of reason (*b*). The custody of an idiot and of his lands was formerly vested in the lord of the fee (*c*) ; but, by common consent, it was afterwards given to the King as the general conservator of his people (*d*). The prerogative in this matter is declared by the *De Prærogativâ Regis* in the reign of Edward the Second (1324), which, in affirmance of the common law (*e*), directs that the King shall have ward of the lands of natural fools, taking the profits without waste or destruction, and finding them necessaries ; and that, after the death of such idiots, he shall render the estate to their heirs, in order to prevent such idiots from alienating their lands, and their heirs from being disinherited. This statute extends to the goods and chattels (*f*), but not to the copyhold lands (*g*), of idiots.

By the old common law, there was a writ *de idiotâ inquirendo*, to inquire whether a man were an idiot or not (*h*) ; which question was tried by a jury of twelve men. And if they found him *purus idiota*, the profits of his lands and the custody of his person belonged to the King, who might have granted them to any subject he pleased (*i*) ; but no grievance of this kind ever now occurs, for that part of the prerogative which relates to idiots has been long merged in the part of the prero-

(*a*) *Ante*, bk. iii. ch. iv.

(*b*) F. N. B. 233 ; *Ball v. Mannin* (1829) 3 Bligh (N.S.) 1.

(*c*) Fleta, lib. 1, ch. 11, s. 10.

(*d*) F. N. B. 232.

(*e*) *Beverley's Case* (1603) 4

Rep. 126.

(*f*) *Beverley's Case*, *ubi sup.* ; F. N. B., *ubi sup.*

(*g*) Bac. Ab. *Idiots*, C.

(*h*) F. N. B. 232.

(*i*) 4 Inst. 203.

[gative which relates to lunatics, to the consideration of which we will now proceed (a).

A *lunatic* is a person who hath had understanding ; but by disease, grief, or other accident, hath lost the use of his reason (b), or has become *non compos mentis*, that is, of mind so unsound as to be incapable of conducting himself or his affairs. And the term *non compos* is the more legal, the term *lunatic* being in its derivation applicable only to one that hath lucid intervals ; though now used technically, as well as popularly, in the more extended sense, of a person affected by any species of insanity supervening since his birth. To all lunatics, as well as to idiots, the King is guardian ; but, in the case of lunatics, the law always imagines that the lunacy may determine, and therefore only constitutes the Crown a trustee to protect the property, accounting to the lunatic for the profits received, if he recover, or, after his decease, to his representatives. And, by the *De Prærogativâ Regis* of Edward the Second, it is declared, that the King shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use when they come to their right mind ; and further, that the King shall take nothing to his own use, but that the residue, on the death of the lunatic dying in his lunacy, shall go to his or her executors or administrators.

The method of proving a person *non compos* is very similar to that of proving him an idiot. The Lord Chancellor, to whom, by special authority from the King, the custody of both idiots and lunatics is entrusted (c), upon petition or information, grants a

(a) Under s. 341 of the Lunacy Act, 1890, 'lunatic' (where not inconsistent with the context) includes 'idiot.'

(b) *Idiota a casu et infirmitate*.—Mem. Scacc. 20 Edw. 1

(in Maynard, *Year Book of Edward 2*), 20.

(c) *Sheldon v. Fortescue Aland* (1731) 3 P. Wms. 105 ; *Re Heli* (1748) 3 Atk. 635.

[commission in the nature of the old writ *de lunatico inquirendo*, (which is analogous to that *de idiotâ inquirendo* before mentioned,) to inquire into the party's state of mind ;] and the proceedings on the commission are now regulated by the Lunacy Act, 1890, which repeals, but in substance re-enacts, the three earlier Lunacy Acts of 1853, 1862, and 1882. Under this Act, as amended by the Lunacy Acts, 1891, 1908, and 1911, and the Orders and Rules made thereunder (*a*), the commission is general, and is directed to certain judicial officers called Masters in Lunacy (*b*) ; but the inquiry into the state of mind of the party, as authorised by such commission, usually takes place before a jury (*c*) on an issue directed by the Lord Chancellor to be determined in that manner (*d*). The verdict on the inquisition must be upon the oath of twelve men at the least (*e*) ; and, except in special cases, the verdict is to be given after the due examination of the alleged lunatic, both before the taking of the evidence, and also at the close of the proceedings, before they consult as to their verdict (*f*)

(*a*) The rules now in force are the Rules of 1892 (dated the 6th Feb. 1892), as amended by rules and orders of 1893 and 1900. See *Statutory Rules and Orders*, *sub tit.* Lunacy.

(*b*) Lunacy Act, 1890, s. 112.

(*c*) On the other hand, where the alleged lunatic does not demand an inquiry before a jury, or where the Lord Chancellor is satisfied (by personal examination), that the lunatic is incompetent to form and express a wish in that behalf, the Masters in Lunacy may, without a jury,

inquire into the party's state of mind, and certify their finding thereon (*Ibid.* ss. 91, 92 ; *Ex parte Gregory* [1901] A. C. 128).

(*d*) Lunacy Act, 1890, s. 94. Unless the judge trying such issue shall otherwise direct, no evidence as to anything said or done at any time more than two years before the inquiry, is receivable in proof of the insanity (s. 98).

(*e*) As to the jury, and the trial of the issue, see Lunacy Act, 1890, ss. 97, 99, 100 ; and as to a new trial, or a fresh inquiry, see s. 103.

(*f*) Lunacy Act, 1890, s. 94.

—the examination being either in open court or in private, as the judge trying the issue shall direct (*a*). And if by the verdict the party be found *non compos*, the care of his person, with a suitable allowance for his maintenance (*b*) in some private or public asylum where an asylum is requisite, is usually committed to some friend, who is then called his *committee* (*c*). [In order to prevent sinister practices, the next heir is seldom permitted to be the committee of the *person*; because it is his interest that the party should die. But it has been said that the same objection does not lie against his next of kin, provided he be not also his heir; for it is supposed to be his interest to preserve the lunatic's life, in order to increase the personal estate, by the savings which he or his family may hereafter be entitled to enjoy (*d*). The heir is generally made the manager or committee of the *estate*, it being clearly his interest by good management to keep it in condition; but he is accountable to the Court, and to the *non compos* himself, if he recovers, and, otherwise, to his administrators (*e*).] Moreover, every person

(*a*) Lunacy Act, 1890, s. 94; *In re Scott* (1884) 27 Ch. D. 116.

(*b*) *In re French* (1868) L. R. 3 Ch. 317.

(*c*) See Lunacy Act, 1890, ss. 108, 116. The civil law agreed with ours in assigning to persons of unsound mind curators to manage their persons and estates; but, in one respect, the Roman law went much beyond the English. For if a man, by notorious prodigality, was in danger of wasting his estate, he, too, was committed to the care of a curator (Dig. 27, 10, 1); but with us, when a man is *unthrif*t, no proceedings are taken (Bro. Abr. *Idiot*, 4).

And yet the property may be protected by the appointment of a committee of the *estate*, although there is no such lunacy as necessitates a committee also of the *person* (Lunacy Act, 1908, s. 1).

(*d*) *Ex parte Ludlow* (1731) 2 P. Wms. 638. A portion of the lunatic's estate will sometimes be directed to be applied towards the maintenance of his next of kin if in needy circumstances (*In re Frost* (1870) L. R. 5 Ch. 699; *In re Evans* (1882) 21 Ch. D. 297; *In re Weaver*, *ibid.* 615).

(*e*) The committee is empowered in many cases to represent or act for the lunatic

found by inquisition to be lunatic is to be personally visited, seen, and reported upon, by official *visitors*, four times at the least in every year, and at such other times as the Lord Chancellor may direct; and the statute law contains, also, a variety of other provisions for the protection and management of persons who are lunatic, and the custody and management of their property. Consideration of pauper lunatics shall be reserved for a subsequent division of this work (*a*).

[(10) The King is likewise the fountain of honour, of office, and of privilege. It is impossible for any government to be maintained without a due subordination of rank; for how otherwise shall the people know and distinguish such as are set over them, so as to yield them due respect and obedience? And as the law supposes that no one can be so good a judge of merit as the King himself, it has, therefore, entrusted to him the sole power of conferring dignities and honours, in confidence that he will bestow them upon none but such as deserve them. Hence, all degrees of nobility and of knighthood, and all other titles and distinctions, are received by immediate grant from the Crown; expressed either in writing, by writs or letters patent, as in the creation of peers and baronets, or by corporal investiture, as in the creation of a simple knight.] And the law prohibits all subjects of the realm from accepting any title or decoration from a foreign prince; unless with the consent of their own monarch.

[From the same principle also arises the prerogative of erecting and disposing of offices; for honours and offices are in their nature convertible and synonymous. All offices under the Crown carry, in the eye of the law, an honour with them; being supposed to be

(Lunacy Act, 1890, ss. 116, 120, 125, 126, 128, and 133–143). As to charging the lunatic's property for his bene-

fit, see ss. 117, 118; and *In re Plenderleith* [1893] 3 Ch. 332.

(*a*) *Post*, bk. iv. pt. iii. ch. xii. (vol. iii., pp. 192–206).

[always filled with those that are most able to execute them. And, conversely, all honours, in their original, had offices annexed to them ; an earl (*comes*) having been the conservator or governor of a county, and a knight (*miles*) having been bound to attend the King in his wars. For the same reason, therefore, that honours are in the disposal of the King, offices ought to be so likewise. And as the King may create new titles, so he may create new offices ; but with this restriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices (*a*). For this would be a tax upon the subject, which cannot be imposed but by Act of Parliament (*b*). Upon the same or the like reason, the King has also the prerogative of conferring privileges upon private persons ; such as granting place or precedence to any of his subjects, as shall seem good to his royal wisdom (*c*).] But he cannot, on the creation of a peer, give him precedence before others of the same rank ; the power of the Crown in that respect being restrained by the 31 Hen. 8 (1539) c. 10, which settles the place and precedence of all the nobility and great officers of state.

In connection with this branch of the prerogative, it may also be mentioned, that by the Civil List Act, 1837, Queen Victoria was empowered to grant *pensions* to the amount of 1,200*l.* per annum, chargeable on her Civil List revenues, in order to make provision for the support of persons who either had just claims on the royal beneficence, or who might have merited the gratitude, while they needed the aid, of their country (*d*) ; and the provisions of the Act of 1837

(*a*) Com. Dig. *Prerog.* D. 37.

(*b*) 2 Inst. 533.

(*c*) 4 Inst. 361.

(*d*) Pensions granted by Parliament for distinguished services are now subject to com-

mutation (Pensions Commutation Acts, 1871, 1876, and 1882) ; and all the Acts authorising the issue of secret service money for home service have now been repealed (Secret

are continued by the Civil List Act, 1910, during the present reign, except that the pensions are not to be granted as chargeable on the Civil List.

[(11) Another light in which the law of England considers the King, with regard to domestic concerns, is as the arbiter of commerce ; and the royal prerogative, so far as it relates to this subject, will fall principally under the following articles.

First, the establishment of public *MARTS*, or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging (*a*) ; all which can only be set up either by virtue of the royal grant, or by long and immemorial usage and prescription, which supposes such a grant to have been originally made (*b*), or else by Act of Parliament (*c*).

Second, the regulation of *WEIGHTS AND MEASURES*. These, for the advantage of the public, ought to be universally the same throughout the kingdom ; being the general criterions which reduce all things to the same or an equivalent value. But as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or test. It is therefore necessary to have recourse to some visible, palpable, material standard ; by forming a comparison with which, all weights and measures may be reduced to one uniform size. The prerogative of fixing such a standard our antient law vested in the Crown ; as in Normandy it belonged to the Duke (*d*). And this standard, which was originally kept at Winchester, was, by the Laws

Service Money (Repeal) Act, 1886). (As to issues for *foreign* service, see s. 25 of the Civil List and Secret Service Money Act, 1782, ss. 25–28.)

(*a*) *Ante*, vol. i. pp. 278–281.

(*b*) 2 Inst. 406 ; and *vide*

*sup.* vol. i. pp. 280–281.

(*c*) *Manchester Corporation v. Lyons* (1882) 22 Ch. D. 287 ; *Abergavenny Commissioners v. Straker* (1889) 42 Ch. D. 83.

(*d*) *Gr. Coustum.* ch. xvi.

[of King Edgar (*a*), near a century before the Conquest, directed to be observed throughout the realm.

Most nations have regarded the standard of measures of length, by comparison with the parts of the human body ; as the palm, the hand, the span, the foot, the cubit, the ell, the pace, and the fathom (*b*). But as these are of different dimensions in men of different proportions, our antient historians inform us, that a new standard of longitudinal measure was ascertained by King Henry the First, who commanded that the *ulna*, or antient ell (which answers to the modern *yard*), should be made of the exact length of his own arm (*c*). And, by the statute called *Compositio Ulnarum et Periticarum*, five yards and a half make a perch ; and the yard is subdivided into three feet, and each foot into twelve inches, which inches will be each of the length of three grains of barley. Superficial measures are, of course, derived by squaring those of length ; and measures of capacity by cubing them.

The standard of *weights* was originally taken from corns of wheat, whence the lowest denomination of weights we have is still called the grain ; thirty-two of which are directed, by the statute called *Compositio Mensurarum*, to compose a pennyweight, whereof twenty make an ounce, twelve ounces a pound, and so upwards.

The first standards having been thus originally fixed by the Crown, their subsequent regulation has been, in general, entrusted to Parliament. Thus, under Richard the First, in his Great Council holden at Westminster (A.D. 1197), it was ordained, that there

(*a*) Cap. 8.

(*b*) A cubit (*cubitus*) is the distance from the elbow to the extremity of the middle finger, *i.e.*, the fourth part of a well-proportioned man. A fathom (derived from a Saxon word) is

the space to which a man can extend with both arms (Johnson's Diet.).

(*c*) Will. Malmsb., *Vita Hen.* 1 ; Spelm. Hen. 1, in Wilkins, 299.



[should be only one weight and one measure throughout the kingdom (a) ; and that the custody of the assize, or standard of weights and measures, should be committed to certain persons in every city and borough. It is from this that the antient office of the King's aulnager seems to have been derived ; whose duty it was, for a certain fee, to measure all cloths made for sale, till the office was abolished by the 11 & 12 Will. 3 (1699) c. 20. These original standards were called *pondera regis* (b), and *mensuræ domini regis* (c) ; and were directed by a variety of subsequent statutes to be kept in the Exchequer, and all weights and measures were to be made conformable thereto. But, as Sir Edward Coke observes, though this had been often by authority of Parliament enacted, yet it could never be effected ; so forcible is custom with the multitude (d).] In our own times, however, new parliamentary enactments have from time to time been devised on the subject ; and other weights and measures have been substituted for those which antiently obtained. By the Weights and Measures Act, 1878 (e), a fresh effort was recently made to promote the desirable objects of simplicity and uniformity in this important matter ; the Act repealing almost the whole of the enactments previously in force on the subject.

After providing generally that the same weights and measures shall be used throughout the United Kingdom (f), the Act of 1878 enacts, that the standards

(a) See also Magna Carta, cap. 25.

(b) Plac. 35 Edw. 1, in Cowell, *Interpr. tit. Pondus regis*.

(c) Flet. 2, 12.

(d) 2 Inst. 41.

(e) The Act has been amended by the Weights and Measures Acts, 1889, 1892,

1893, and 1904.

(f) S. 3. By one of the previous statutes (5 & 6 Will. 4 (1835) c. 63), an attempt had been made in the same direction by abolishing the use of the 'Winchester bushel,' as well as of all other 'local and 'customary measures.'

described in the schedules thereto shall continue to be the imperial standards for determining the length of a yard, and the weight of a pound (*a*). It then proceeds to lay down certain careful regulations by which these standards shall be made subservient to the object of correctly ascertaining the length of the yard, which is to be the only unit or standard measure or extension from which all other measures shall be ascertained; and the weight of the pound, which is to be the only unit or standard measure of weight from which all other weights, and all measures having reference to weight, shall be ascertained. The unit or standard measure of capacity, from which all other measures, as well for liquids as for dry goods, are to be ascertained, is to be the gallon containing ten imperial standard pounds weight of distilled water in the manner described in the Act (*b*). Moreover, every contract having reference to weight or measure is to be deemed to be made according to the imperial weights or measures ascertained by the Act, and if otherwise made is to be void (*c*); and the use of local or customary measures, and of the heaped measure, in common use previously

(*a*) The imperial standard yard is a solid square bar of bronze or gun metal; and the standard for determining the weight of a pound is of platinum in the form of a cylinder, with a groove or channel round it for the insertion of the points of the ivory fork by which it is to be lifted (Act of 1878, Sched. I. Pt. I.).

(*b*) *Ibid.* s. 15. (As to the verification of *local* and *working* standards, and the official inspection from time to time of weights and measures and weighing and measuring instruments in use by traders,

see ss. 37, 40–49, of the Weights and Measures Act, 1878, ss. 2 and 9 of the Weights and Measures Act, 1889, and s. 6 of the Weights and Measures Act, 1904. See also the Weights and Measures Regulations, 1907, made pursuant to s. 5 of the Weights and Measures Act, 1904.)

(*c*) Act of 1878, s. 19. By the Sale of Gas Act, 1859 (amended by the Sale of Gas Act, 1860, and the Metropolis Gas Act, 1861), special regulations are made as to the measures to be used in the sale of *gas*.

to the Act, is expressly prohibited, and the seller made liable to a penalty. But these provisions do not extend to render unlawful the use of the metric system to be presently mentioned (*a*) ; and the use of ‘cran’ measures, in connection with the sale of herrings, is still permissible in such districts of England and Wales as may be ordered, on the application of a local authority, by the Board of Agriculture, to be made subject to the Cran Measures Act, 1908 (*b*).

The Weights and Measures Act, 1878, further contains a regulation, that all articles sold by weight shall be sold by *avoirdupois* weight, except gold, silver, platinum, diamonds, or other precious stones, which may be sold by *troy* weight (*c*), and drugs, which, when sold by retail, may be sold by *apothecaries’* weight (*c*) ; and further, that it shall be penal for any person to sell by any denomination of weight or measure, other than one of the imperial weights or measures, or some multiple or part thereof (*d*). But it being considered expedient, for the promotion and extension of our internal as well as our foreign trade, and for the advancement of science, to legalise, without making compulsory, the use of the *metric* system of weights and measures, the Act contains a provision on this subject, and sets forth a Table containing the equivalents of imperial weights and measures expressed in terms of the metric system, and declares that the Table may be lawfully used for computing and expressing in weights and measures, weights and measures of the metric system (*e*) ; and the Weights and Measures

- |   |   |
|---|---|
| (a) Weights and Measures (Metric System) Act, 1897, s. 1. | in Sched. III. to the Act of 1878 is now replaced by that |
| (b) S. 11.  | contained in the schedule to                              |
| (c) <i>Ibid.</i> , s. 20.                                 | the Order in Council of 19th                              |
| (d) <i>Ibid.</i> s. 19.                                   | May, 1898 (St. R. & O.,                                   |
| (e) <i>Ibid.</i> s. 18. The Table                         | 1898, No. 411).   |

(Metric System) Act, 1897 (a), contains other provisions in the same direction. The power given by the Act of 1897, to make a metric standard, has been exercised by Order in Council of the 19th May, 1898 (b). In conclusion, we may observe, that the custody of the imperial standards, and the general carrying out of the whole system, are now entrusted to the Board of Trade; and not, as at one time, to the Exchequer and the Treasury (c).

[Thirdly, MONEY being the medium of commerce, it is the King's prerogative, as the arbiter of domestic commerce, to give it authority and to make it current. Money is the sign of value; and metals being durable and capable of many subdivisions, are well calculated for this sign—a precious metal especially so, being the scarcest and most portable.] In all civilised countries, therefore, it is the metals which are used for money (d); and for this purpose they are first *coined*, or fabricated into certain pieces by public authority, which declares at what value, in relation to other known pieces or quantities of metal, they are to be taken (e).

[With respect to coinage in general, there are three

(a) S. 2.

(b) St. R. & O., 1898, No. 410.

(c) Weights and Measures Acts 1878, s. 33; 1904, s. 5. (There is an exception for the Board of Agriculture in the case of 'cran' measures (see *ante*, p. 628).)

(d) The circulating medium in this country consists, not only of coin, but of paper, that is, of notes of the Bank of England, and of a few other banks; but as these notes are convertible at the pleasure of the holder into coin, the

circulating medium is, in effect, exclusively metallic.

(e) By the Coinage Act, 1870, s. 11 (8), the Crown may direct the establishment of a branch of the Mint in any British possession, and determine the extent to which coins issued therefrom are to be current and a legal tender. (See further as to mints in British possessions, Jenkyns, *British Rule and Jurisdiction beyond the Seas*, pp. 28–30; and, as to coinage in the Colonies, Chalmers, *Colonial Currency* (1893).)

[things to be considered ; namely, the materials, the impression, and the denomination. With regard to the materials, it is laid down by Sir Edward Coke, that the money of England must either be of gold or silver (*a*). And, indeed, none other was ever issued by the royal authority till 1672 ; when copper farthings and halfpence were coined by King Charles the Second, and ordered by proclamation to be current in all payments under the value of sixpence, but not otherwise.] More recently, in the year 1861, instead of pure copper, coins composed of bronze or other mixed metal were authorised as current coin of the realm. Payment in silver or in copper (bronze) coin is only a legal tender up to a certain amount ; it being provided by the Coinage Act, 1870 (*b*), that gold coin shall be the only legal tender, except as regards sums not exceeding forty shillings, which may be tendered in silver coins, or not exceeding the sum of one shilling, which may be tendered in bronze coins. But a Bank of England note, payable to bearer on demand, is legal tender, by force of the Bank of England Act, 1833 ; except by the bank itself (*c*).

[As to the impression, the stamping of money is the unquestionable prerogative of the Crown ; for, though divers bishops and monasteries had formerly the privilege of coining money, yet, as Sir Matthew Hale observes, this was usually done by special grant from the King, or by prescription, which supposes such grant (*d*), and, therefore, was derived from, and not in derogation of, the royal prerogative.

The denomination, or value for which the coin is to pass current, is likewise in the breast of the King ; and if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight and the fineness of the metal are to be

(*a*) 2 Inst. 577.

(*b*) S. 4.

(*c*) Bank Act, 1833, s. 6.

(*d*) 1 Hale, P. C. 191.

[taken into consideration together ; and when a given weight of gold or silver is of a given fineness, it is then of the true standard, and called ‘esterling’ or ‘sterling’ metal (*a*), a name for which there are various reasons given, but none of them entirely satisfactory (*b*). Of this esterling or sterling metal, all the gold and silver coin of the kingdom had, by the 25 Edw. 3, st. 5 (1351) c. 13, to be made (*c*) ; so that the royal prerogative did not extend to the debasing or enhancing the value of the coin, below or above the sterling value (*d*), though Sir Matthew Hale was of the contrary opinion (*e*).

The King may also, by his proclamation, legitimate foreign coin, and make it current here (*f*), declaring

(*a*) Coinage Act, 1870, ss. 3, 16, 17. (See also Weights and Measures Act, 1878, ss. 8, 34, 36, Sched. II.) The standard of gold and silver has frequently varied ; but is now settled in accordance with what was provided by 56 Geo. 3 (1816) c. 68.

(*b*) See Spelm. *Gloss.* 203 ; and Ducange, iii. 165. The most plausible opinion seems to be that adopted by these two etymologists, viz., that the name was derived from the *Esterlingi*, or Easterlings, as those Saxons were antiently called, who inhabited that district of Germany afterwards occupied by the Hanse towns and their appendages, and who were the earliest traders in modern Europe.

(*c*) The ascertainment of the proper standard of the coin is called *pixing* it ; and there are occasions on which resort is had, for this purpose,

to an antient mode of inquisition, called the ‘trial of the ‘pyx,’ before a jury of members of the Goldsmiths’ Company. (See Coinage Act, 1870, s. 12. For information on this subject, see *Archæologia*, vol. xvi. ; Ruding, *Annals of the Coinage*.) The constitution of the Mint was remodelled in the year 1815, and again in 1870 ; when the Chancellor of the Exchequer for the time being was made the Master of the Mint, the custody of the standard weights committed to the Board of Trade, and the general superintendence of the Mint entrusted to the Treasury, which appoints a Deputy Master of the Mint (Coinage Act, 1870, ss. 13–15).

(*d*) 2 Inst. 577.

(*e*) 1 Hale, P. C. 194.

(*f*) Coinage Act, 1870, s. 11 (7).

[at what value it shall be taken in payment, by comparison with the standard of our own coin (*a*); he may, moreover, at any time decry, or cry down, any coin of the kingdom, and make it no longer current (*b*).] But, though the regulation of the coinage thus forms part of the prerogative of the Crown, it is nevertheless a subject over which Parliament also exercises a control; and since the Revolution, it is under the authority of Parliament that the coinage has been in fact principally regulated (*c*).

[(12) The King is, lastly, considered by the laws of England as the Head and Supreme Governor of the Established Church. To enter into the reasons upon which this prerogative is founded, is matter rather of divinity than of law; it will be sufficient, therefore, to observe that, by the Act of Supremacy of 1534, it is enacted, that the King shall be reputed the only Supreme Head, on earth, of the Church of England, and shall have annexed to the imperial crown of this realm as well the title and style thereof, as all jurisdictions, authorities, and commodities, to the said dignity of the Supreme Head of the Church appertaining. This Act was repealed under Queen Mary; but the Act of Supremacy passed in the first year of Elizabeth (1558), though it did not go the length of the statute of 1534, yet required the Queen to be acknowledged as supreme in all causes, as well ecclesiastical as temporal. By virtue of this supremacy it is the King that convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical synods, or convocations. This was, indeed, an inherent and antient prerogative of the Crown, as appears by the 8 Hen. 6 (1429) c. 1, and the many authors, both lawyers and historians, vouched by Sir

(*a*) 1 Hale, P. C. 197.

(*b*) *Ibid.*

(*c*) As to offences relating

to the coin, see *post*, bk. vi. ch. v. (vol. iv. pp. 130–136).

[Edward Coke (*a*). The convocations, or ecclesiastical synods, in England, differ considerably in constitution from the synods of other Christian kingdoms; these latter consisting wholly of bishops, while the English convocations (of which there are two, one for the province of Canterbury, the other for that of York) are more in the nature of parliaments, all the beneficed clergy having representatives therein, who share with the bishops and other dignitaries such rights as the convocations possess. This constitution is said to be owing to the policy of Edward the First; who at one and the same time let into these assemblies the inferior clergy, and introduced a method of taxing ecclesiastical benefices by consent of convocation (*b*).]

All deans and archdeacons are members of the convocation of their province. Each cathedral chapter sends one proctor or representative; and in the province of Canterbury the beneficed parochial clergy send two proctors for each diocese. But, on account of the small number of dioceses in the province of York, the beneficed clergy of that province elect two proctors for each archdeaconry; and the metropolitan chapter there elects two proctors instead of only one. There are two distinct Houses of either convocation, of which the archbishop and bishops form the Upper House, and the deans, archdeacons, the proctors for the chapters, and the proctors for the parochial clergy, the Lower (*c*). The convocations, however, can make no statutes, or, as they are called, *canons*, or even confer for that purpose, without licence from the sovereign; nor can they make any repugnant to the common or statute law of the land (*d*). And none of their canons bind the

(*a*) 4 Inst. 322, 323. (See also 25 Hen. 8 (1534) c. 19.)

(*b*) Gilb. *Hist. of Exch.* ch. iv.

(*c*) As to non-residentiary prebendaries not being able to

vote at the election of a proctor, see *Randolph v. Milman* (1868) L. R. 4 C. P. 107.

(*d*) 25 Hen. 8 (1534) c. 19, ss. 1, 3.



laity, unless they pass both Houses of Parliament (a). And although, till the 15 Car. 2 (1663) c. 10, the beneficed clergy continued formally to tax themselves in convocation, they have not done so since that time; it being now judged more advantageous to include them in the Money Bills passed by the Commons, and to allow them on the other hand to vote for members of Parliament—a privilege that did not before belong to them (b).

[From this prerogative, of being the Head of the Church, arises also the King's right of nomination to vacant bishoprics, and to certain other ecclesiastical preferments; a subject which will more properly be considered when we come to treat of the Church (c). It is sufficient at present to observe, that this right now rests upon the 25 Hen. 8 (1534) c. 20, commonly called the 'Act of Annates.'

As Head of the Church, the King is likewise the ultimate court of appeal (*dernier ressort*) in ecclesiastical causes; the Judicial Committee of his Privy Council now hearing such appeals (d).]

(a) As to the canons of convocation passed in 1603, see *Middleton v. Crofts* (1736) 2 Atk. 650; and as to the canons of 1640 see *Elphinstone v. Purchas* (1870) L. R. 3 Adm. & Eccl., at p. 83.

(b) As to convocations, see 4 Inst. 322; Gilb. *Exch.* ch. iv.; Burn, *Eccl. Law, Convoc.*;

Com. Dig. *Convoc.*; Hallam, *Constit. Hist.* (3rd edn.) vol. iii. pp. 236, 324; and *R. v. Abp. of York* (1888) 20 Q. B. D. 740.

(c) Bk. iv. pt. ii. ch. i. (See *post*, pp. 757–759.)

(d) See *ante*, pp. 580–581, and *post*, p. 764.

## CHAPTER VII.

## OF THE ROYAL REVENUE.

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It is an interesting and important fact, that, in spite of the great attention given to financial matters in the course of English constitutional development, and the early pre-eminence of Parliament in questions of taxation, yet there is not, and never has been, legally speaking, any national revenue. In the early days of our history, the defence of the realm, and the other duties of government, were performed by the King with the aid of such funds as he could claim by conquest, inheritance, tradition, or gift ; supplemented occasionally, and with considerable difficulty, by the results of national taxation. In later days, the recurrence of taxes became regular and frequent ; and, after much disputing, the respective rights of the Crown and the Parliament in the matter of taxation were settled. Moreover, though not until much later, a definite distinction began to be drawn between such of the royal expenditure as was concerned with the King's private and domestic life, and such of it as was devoted to strictly public objects. But still, the legal doctrine, that all public revenue is the revenue of the Crown, that it can only be granted to, and on the request of, the Crown, and that it can only be expended by the Crown, remains a fundamental principle of our fiscal system. Wherefore, though the right of levying taxation has, of course, long since ceased, if it ever existed, to be part of the royal prerogative, it is strictly correct to treat of the revenue as a branch of the royal prerogative.

[The revenue of the Crown is either extraordinary or ordinary. The King's *ordinary* revenue is such as has either subsisted time out of mind in the Crown ; or else has been granted by Parliament by way of purchase or exchange for such of the King's hereditary revenues as were found inconvenient to the subject.

When we say that the ordinary revenue has subsisted time out of mind in the Crown, we do not intend it to be understood that the Crown is at present in the actual possession of the whole of this revenue ; much of it being at this day in the hands of subjects, to whom it has been granted from time to time by the Kings of England. So that we must be obliged to recount, as part of the royal revenue, what lords of manors and other subjects frequently look upon to be their own absolute rights, because they are and have been vested in them and their ancestors for ages, though in reality originally derived from the grants of our antient princes. We shall consider first the different heads of the ordinary revenue, and then pass to the extraordinary revenue, or revenue from taxation.

#### THE ORDINARY REVENUE OF THE CROWN.

I. The first head of the ordinary revenue of the Crown is of an ecclesiastical kind, viz., the custody of the temporalities of bishoprics, by which are meant all the lay revenues which belong to the see of an archbishop or bishop. And these, on the vacancy of the bishopric, are immediately the right of the King, as a consequence of his prerogative in Church matters ; whereby he is considered, as the founder of all archbishoprics and bishoprics, the person to whom during the vacancy they revert. The Crown takes all the intermediate profits until the appointment of a successor, and that without account ; and before the dissolution of the abbeys, the Crown had also, on the death of the abbot or prior, the custody of the

[temporalities of all such abbeys and priories as were of royal foundation, with the like right to the intermediate profits. This revenue was esteemed of so high a nature, that it could not, by the common law, have been granted out to a subject, before, or even after, it had accrued ; but by the 14 Edw. 3, st. 4 (1340) cc. 4 and 5, the King might, after the vacancy, have leased the temporalities to the dean and chapter, saving to himself all advowsons, escheats, and the like. Our antient Kings were remarkable for keeping the bishoprics a long time vacant (*a*) ; and they sometimes, for trifling causes or no cause at all, seized into their own hands the temporalities of bishops, even during their lives. But all such practices have been long discontinued ; and now, as soon as the new bishop is consecrated and confirmed, he usually receives the temporalities entire and untouched from the Crown ; at the same time doing homage to the King. And then, and not sooner, he has a freehold in his bishopric, and may maintain an action for the profits (*b*). This head of the ordinary revenue has, therefore, now ceased to be a calculable item.

II. The next head of the ordinary revenue is also of an ecclesiastical kind ; namely, the first-fruits and tenths of all spiritual preferments in the kingdom. These were originally a part of the papal usurpations over the clergy of this kingdom, first introduced by Pandulph, the Pope's legate, during the reigns of King John and Henry the Third, in the see of Norwich, and afterwards attempted to be made universal by the Popes Clement the Fifth and John the Twenty-second, about the beginning of the fourteenth century. The first-fruits (*primitiæ* or *annates*) were the first year's

(*a*) An instance of this occurred as late as the reign of Queen Elizabeth, who kept the see of Ely vacant nineteen years, in order to retain the revenues (Strype, vol. iv. 351).  
 (*b*) Co. Litt. 67, 341.

[whole profits of the spiritual preferment, according to a rate or *valor* made in the time of Pope Innocent the Fourth, by Walter, Bishop of Norwich, and afterwards advanced in value, by commission of Pope Nicholas the Fourth, under a taxation by the King's precept. Which valuation (called that of Pope Nicholas) was begun in 1288, and finished in 1292, and is still preserved in the Exchequer (*a*). The tenths (or *decimæ*) were the tenth part of the annual profit of each living by the same valuation; and this tenth part was also claimed by the Holy See, under the pretence of that precept of the Levitical law, which directs, "that the "Levites should offer the tenth part of their tithe as "a heave-offering to the Lord; and give it to Aaron "the high priest" (*b*).

But these pretensions of the Pope met with a vigorous resistance from the English Parliament; and a variety of Acts were passed to prevent and restrain them, particularly the 6 Hen. 4 (1404) c. 1, which calls the payment of first-fruits a 'horrible mischief and damnable custom.' Nevertheless, the popish clergy, blindly devoted to the will of a foreign master, still kept the papal claims on foot; and in the reign of Henry the Eighth, it was computed, that, in the compass of fifty years, 800,000 ducats had been sent to Rome for first-fruits alone. And, as the clergy expressed this willingness to contribute so much of their income to the Head of the Church, it was thought proper, when in the same reign the papal power was abolished, and the King was declared the Head of the Church of England, to annex this revenue to the Crown. This was accordingly done by the 26 Hen. 8 (1534) c. 3 (*c*); whereby it was enacted, that commissioners should be appointed in every diocese, to certify the value of every ecclesiastical benefice and preferment,

(*a*) 3 Inst. 154.

(*c*) Ss. 9–11.

(*b*) Numb. xviii. 26.

[and that according to this valuation the first-fruits and tenths should be collected and paid in future.

This valuation of benefices, or *Valor Beneficiorum*, was accordingly made, and is what is commonly called the 'King's Books'; and the clergy are at present rated in accordance with it (*a*). But by the 1 Eliz. (1558) c. 4 (*b*), all vicarages under ten pounds a year, and all rectories under ten marks, were discharged from the payment of first-fruits: and if, in such livings as continued chargeable with the payment, the incumbent lived but half a year, he was to pay only one quarter of his first-fruits; if but one whole year, then half of them; if a year and a half, three quarters; and if two years, then the whole, and not otherwise (*c*). By Queen Anne's Bounty Act, 1707 (*d*), archbishops and bishops have four years allowed for the payment, and pay one quarter every year, if they live so long upon the bishopric; but other dignitaries of the Church pay on the same principle as rectors and vicars. Likewise, by the 27 Hen. 8 (1535) c. 8, no tenths are to be paid for the first year, for then the first-fruits are due; and by certain statutes of Queen Anne (6 Ann. cc. 24 and 54) of the years 1706 and 1707, if a benefice be under fifty pounds per annum clear yearly value, it is to be discharged of the payment both of first-fruits and of tenths.

The piety of Queen Anne also restored to the Church what had been indirectly taken from it; not indeed by remitting the tenths and first-fruits entirely, but by applying the superfluities of the larger benefices to make up the deficiencies of the smaller. To which end she granted her royal charter, confirmed by the 2 & 3 Ann. (1703) c. 11; whereby all the revenue of first-fruits and tenths, under the name of *Queen Anne's Bounty*, is

(*a*) This *valor* will be found  
in Ecton's *Thesaurus*.

(*b*) S. 5.

(*c*) *Ibid.*, s. 6.

(*d*) Ss. 5, 6.

[vested in trustees for ever, to form a perpetual fund for the augmentation of poor livings (a).

III. The next branch of the King's ordinary revenue (which, as well as the subsequent branches, is of a lay or temporal nature), consists in the rents and profits of the demesne lands of the Crown. These demesne lands, *terræ dominicales regis*, being either the share reserved to the Crown on the original distribution of landed property, or such as came to it afterwards by forfeitures or other means, were antiently very large and extensive, comprising divers manors, honours, and lordships, the tenants of which had very peculiar privileges, as has been shown in a former Book of these Commentaries, when we spoke of the tenure in antient demesne (b). At present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. This has occasioned the Parliament frequently to interpose; and particularly, after King William the Third had greatly impoverished the Crown, an Act was passed, by the effect of which, and of subsequent statutes of the reign of Queen Anne and later reigns on the same subject, all grants or leases from the Crown of any royal manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments for any longer term than thirty-one years, are, in general, declared to be void (c). And no reversionary lease can be made, so as to exceed, together with the estate in being, the same term of thirty-one years. Every tenant is, moreover, to be made liable for committing waste; and the usual rent must be reserved, or,

(a) The Acts relating to \* 139.

Queen Anne's Bounty are, (c) Crown Lands Acts, besides those referred to in 1702, and 1829 to 1913; the text, very numerous, and Crown Private Estates Act, 1800; Pensions Act, 1838, cannot be set out in detail.

(b) See *ante*, vol. i. pp. 138- s. 4.

[where there has usually been no rent, then one-third of the clear yearly value.] In modern times, the care and superintendence of the royal demesnes have been vested in the Commissioners of Woods, Forests, and Land Revenues ; a Board of Commissioners which has been separately constituted by the Crown Lands Act, 1851, s. 1 (a).

To the same branch of the royal revenue properly belong also such rights and interests as the Crown enjoys in the foreshore. But, by the Crown Lands Act, 1866, these have now been transferred to the Board of Trade, in aid of the reduction of the National Debt ; and compensation out of the Consolidated Fund is to be made to the Crown for any consequent diminution of its land revenue (b).

None of the restrictions above mentioned extend, of course, to the private estates of the Crown ; that is, speaking generally, to such estates as have been or shall be hereafter purchased or acquired by His Majesty with moneys out of his privy purse, or with other moneys not appropriated to any public service, or which have or shall come to him, his heirs or successors, by gift, devise, or inheritance from any of his

(a) The Board of “ Commissioners of Woods, Forests, Land Revenues, Works and Buildings ” was then divided into two boards, the one mentioned in the text, and the other being the “ Commissioners of Works and Public Buildings.” To this latter board there used to belong (*inter alia*) the management of all the royal parks in and near London (see Crown Lands Act, 1851, s. 21 ; Parks Regulation Act, 1872 ; *Bailey v. Williamson* (1873) L. R. 8 Q. B. 118). But, by the London Parks and

Works Act, 1887, the management of some of these was transferred to the Metropolitan Board of Works, and is now vested in the London County Council as the successors of the Metropolitan Board, under the Local Government Act, 1888.

(b) The ‘ foreshore ’ for the purposes of this Act includes “ the shore and bed of the sea, “ and of every channel, creek, “ bay, estuary, and of every “ navigable river of the United “ Kingdom, as far up the same “ as the tide flows ” (s. 7).



or their ancestors, or from any other person or persons not being Kings or Queens of this realm (a).

IV. [To the ordinary revenue of the Crown might formerly have been referred (1) the advantages which used to arise from the profits of the military tenures, to which most lands in the kingdom were subject, till the 12 Car. 2 (1660) c. 24, in great measure abolished them ; and (2) the profitable prerogative of purveyance and pre-emption. The latter was a right enjoyed by the Crown of buying up provisions and other necessities, by the intervention of the King's purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without consent of the owner ; and also of forcibly impressing the carriages and horses of the subject, to do the King's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor—a prerogative which, during the feudal times, prevailed pretty generally throughout Europe. In those times, the King's household, as well as those of inferior lords, was supported by specific renders of corn and other victuals, from the tenants of their respective demesnes ; and there was also a continual market kept at the palace gate, to furnish viands for the royal use (b). These arrangements sufficed so long as the King's court continued in any certain place ; but when the court removed from one part of the kingdom to another, as was formerly very frequently done, it was found necessary to send purveyors beforehand, to get together a sufficient quantity of provisions and other necessities for the household. And then, lest the unusual demand should raise provisions to an exorbitant price, the powers before men-

(a) Crown Private Estates Acts, 1862 and 1873. (b) 4 Inst. 273.

[tioned were vested in these purveyors, who in process of time very greatly abused their authority, and became a great oppression to the subject, though of little advantage to the Crown. Wherefore, King Charles, at his restoration, consented, by the 12 Car. 2 (1660) c. 24, to resign entirely these branches of his revenue and power ; and the Parliament, in part recompense, settled on him, his heirs and successors for ever, an excise duty on all beer and ale and certain other liquors sold in the kingdom. So that this hereditary excise, the nature of which shall be further explained in a subsequent part of this chapter, at one time formed the fourth branch of His Majesty's ordinary revenue.

V. Another branch of the King's ordinary revenue once consisted in the profits arising from his forests. The nature of forests has been sufficiently explained in a former Book of these Commentaries ; and what we here refer to are those profits arising to the sovereign from hence, which consisted principally in amercements or fines levied for a variety of offences against the forest laws in the forest courts (*a*).] But as the forest laws have long since been practically extinct, the revenue from these sources is now much diminished in importance, being confined principally to certain customary payments, the origin of which is obscure, and to fees arising from licences and appointments to various forest offices.

VI. The profits arising from the King's ordinary courts of justice make another branch of his ordinary revenue. These consist not only in fines imposed on offenders, forfeitures of recognisances, and amercements levied upon defaulters (*b*) ; but also in certain

(*a*) As to forests, see *ante*, vol. i. pp. 281–283.

(*b*) See the Fines Act, 1833 (3 & 4 Will. 4, c. 99), containing

provisions for the more speedy recovery of fines and penalties.

(Much of the Act has been repealed.)

fees due to the Crown in a variety of legal matters. The receipts on the latter account have, however, by the effect of recent improvements in the administration of justice, been considerably reduced, and are also now in great measure prepaid by way of stamps affixed to the various documents in use ; so that but little, under this head, is at the present time directly returned into the royal exchequer.

VII. We shall class together, as a seventh branch of the sovereign's ordinary revenue, his right to royal fish, and to wrecks, treasure-trove, waifs, and estrays. Our reason for so classing them is, that they are all of the nature of *bona vacantia*, or things found without any apparent owner ; and these vest in the Crown, by way of exception from the general rule of law. For, by that general rule, *bona vacantia* are considered as returning, as it were, into the common stock of mankind, and consequently belong, as in a state of nature, to the first occupant or finder ; though he is bound, before he appropriates them, to take reasonable pains to discover the former owner, whose right remains, unless they were designedly abandoned by him (a). The particular subjects of claim, however, which are above enumerated, and to which may now be added personal property held by trustees for beneficiaries, all of whom have died out (b), are all held to vest in the Crown. The true general origin of this peculiarity probably is, (though with respect to some of the objects in this class other reasons are assigned in the books,) that they were formerly of sufficient value, or of sufficiently frequent occurrence, to attract attention,

(a) Britt. ch. 17 ; Finch, 21 L. J. Q. B. 75.  
177 ; *Armory v. Delamirie* (1721) 1 Stra. 505 ; *Merry v. Green* (1841) 7 M. & W. 623 ; *Bridges v. Hawkesworth* (1851)  
(b) *In re Gosman* (1880) 15 Ch. D. 67 ; *Cunnack v. Edwards* [1896] 2 Ch. 679.

and to be made the subject of particular regulation ; while the other cases of finding were, from their insignificance, neglected, or left to the operation of the ordinary rule of law. The regulation which it was thought proper to make, was that of allotting them to the Crown ; either to prevent the strife and contention which the mere title of occupancy is apt to create and continue, or else to provide for the support of public authority in a manner the least burdensome to individuals. And, in point of fact at least, we find that, while the property in *bona vacantia* generally is vested in the finder, subject to the rights of the original owner, yet in the particular instances above enumerated it is annexed to the Crown (*a*).

1. [*Royal fish*. These are whale and sturgeon, which, when either thrown ashore, or caught near the coast, are the property of the King, on account, as it is said in the books, of their superior excellence (*b*). Indeed, our ancestors seem to have entertained a very high notion of the importance of this right, it being the prerogative of the Kings of Denmark and of the Dukes of Normandy ; and from one of these it was probably derived to our princes (*c*). It is expressly claimed and allowed in the *De Prærogativâ Regis* (*d*) ; and the most antient treatises of the law now extant

(*a*) Bract. l. 1, cap. 12.

(*b*) *Case of Mines* (1568) Plowd. 315. It is said, in the *Case of Swans* (1592) 7 Rep. 16 a, that a swan is, in like manner, a royal fowl ; and that all swans, which have no other known owner, do belong to the King by his prerogative.

(*c*) Stiern. *De Jure Sueonum* l. 2, cap. 8 ; *Gr. Coustum.* ch. xvii.

(*d*) The *Prærogativa Regis* is “ an apocryphal statute

“ which may represent the  
“ earlier practice of Edward  
“ I.” (Pollock and Maitland,  
*Hist. of Eng. Law*, i. p. 336).  
In *Constable's Case* (quoted  
below) the right to royal fish  
was not confined to whale and  
sturgeon ; but was said to  
extend also to “ grampuses,  
“ porpoises, dolphins, riggs,  
“ and graspes, and, generally,  
“ whatsoever other fish have in  
“ themselves great and im-  
“ mense size or fat.”

[make mention of it, though they seem to have made a distinction between the whale and the sturgeon, the head only of the whale belonging to the King, while the tail belongs to the Queen. But the whole of the sturgeon belongs to the King. Like other royal rights of a similar kind, the right to royal fish may be claimed as a 'franchise' by a lord of a manor, or other alleged grantee, in a particular area.

2. *Shipwrecks* are also declared by the *De Prærogativa Regis*, to be the King's property; and were so, long before, at the common law. Wreck, by the antient common law, was where any ship was lost at sea, and the goods, or cargo, were thrown upon the land (*a*), in which case the goods so wrecked were adjudged to belong to the King; for it was held, that, by the loss of the ship, all property was gone out of the original owner (*b*). But it was ordained by King Henry the First, that, if any person escaped alive out of the ship, it should be no wreck (*c*); and afterwards, King Henry the Second, by his charter (*d*), declared, that if on the coast or either England, Poictou, Oléron, or Gascony, any ship should be distressed, and either man or beast should escape or be found therein alive, the goods should remain to the owners, if they claimed them within three months, but otherwise should be esteemed a wreck, and should belong to the King, or other lord of the franchise. This charter was confirmed, with improvements, by King Richard the First; who, in the second year of his reign (*e*), not only established these concessions, by ordaining that the owner, if he was shipwrecked and escaped, "*omnes res suas liberas et quietas haberet*," but also

(*a*) *Constable's Case* (1601)      kins), 305.

5 Rep. 106.

(*b*) *Dr. & St. d.* 2, ch. li.

(*c*) *Spelm. Cod.* (ed. Wil-

(*d*) 26th May, 1174 (1

Rymer, *Fæd.* I. 36).

(*e*) Rog. Hoved. in Ric. I.

[that, if he perished, his children, or, in default of them, his brethren and sisters, should retain the property; and only in default of brother or sister should the goods remain in the King. And the law, as laid down by Bracton in the reign of Henry the Third, was to this effect: that if only a dog, for instance, escaped, by which the owner might be discovered, nay, if any certain mark were set on the goods, by which they might be known again, it was held to be no wreck (*a*). And this is certainly most agreeable to reason; the claim of the Crown being only founded upon this, that the true owner cannot be ascertained. Afterwards, by the Statute of Westminster the First (*b*), the law was laid down more agreeably to the charter of Henry the Second; and it was enacted, that if a man, a dog, or a cat, escaped alive, the vessel should not be adjudged a wreck. These animals were put only for examples (*c*); for not only if any live thing escaped, but if proof could be made of the property of any of the goods or lading which came to shore, they were not forfeited as wreck (*d*). The Statute of Westminster the First further ordained, that the sheriff of the county should be bound to keep the goods a year and a day (as in France for one year, agreeably to the maritime laws of Oléron (*e*), and in Holland for a year and a half); so that, if any man could prove a property in them, either in his own right or by right of representation, they should be restored to him without delay. But if no such property were proved within that time, they then should be the King's (*f*). And if the goods were of a perishable nature, the sheriff might sell them,

(*a*) Bract. l. 3, cap. 3, s. 5.

(*b*) 3 Edw. 1 (1275) c. 4.

(*c*) Flet. l. 1, ch. xlv.; 2  
Inst. 167; *Constable's Case*  
(1601) 5 Rep. 107 b.

(*d*) *Hamilton v. Davis* (1771)

5 Burr. 2732.

(*e*) S. 28.

(*f*) 2 Inst. 168.

[and the money was to be liable in their stead (a) This revenue from wrecks was frequently granted out to lords of manors as a royal franchise : but subject, of course, to all the same limitations as wrecks were subject to in the hands of the Crown. Also, where any one was thus entitled to wrecks in his own land, and the goods of the King were wrecked thereon, the King might claim them at any time ; even after the year and a day (b).

It is to be observed, that, in order to constitute a legal wreck, the goods must have come to land (c). If they continue at sea, the law distinguishes them by the appellations of *jetsam*, *flotsam*, and *ligan* ; ‘jetsam’ being where goods are cast into the sea, and there sink and remain under water, ‘flotsam’ where they continue floating on the surface of the waves, and ‘ligan’ where they are sunk in the sea, but tied to a cork or buoy, in order to be found again (d). These goods are also the property of the Crown, if no owner appears to claim them ; but if any owner appears, he is entitled to recover the possession (e). A royal grant of *wreck*, will not, apart from statute, pass things jetsam, flotsam, and ligam, other than such as come ultimately, of their own motion, to land (f).

Wrecks, in their legal acceptation, are at present not very frequent ; for if any goods come to land, it rarely happens, since the improvement of commerce, navigation, and correspondence, that the owner is not able to assert his property within the year and day limited

(a) *Eyston v. Studd* (1574) Act, 1894 )  
Plowd. at p. 466.

(b) 2 Inst. 168 ; Bro. Abr.  
*Wreck*.

(c) *Palmer v. Rouse* (1858)  
3 H. & N. 505 ; Hale, *De Jure*  
*Maris*, ch. vii.

(d) *Constable's Case* (1601) 5  
Rep. 106. (But see section  
510 of the Merchant Shipping

(e) *Quæ enim res in tem-  
pestate levandæ navis causâ  
ejiciuntur, hæ dominorum per-  
manent ; quia palam est, eas  
non eo animo ejici quod quis  
eas habere nolit* (Inst. 2, 1,  
48).

(f) *Constable's Case*, ubi sup.

[by law. And, in order to preserve this property entire for him, our laws, in a spirit quite opposite to those savage laws which formerly prevailed in all the northern regions of Europe, have made many humane regulations (a).] For, by the common law, if any persons, other than the sheriff, took any goods cast on shore, which were not legal wreck, the owners might have a commission to inquire and compel restitution (b); and it was provided, by a statute of Edward the Third, that if any ship were lost on the shore, and the goods came to land, they should presently be delivered to the merchants, the latter paying only a reasonable reward, or *salvage*, to those that saved and preserved them (c). Many additions to the law of wreck and salvage, whereby these subjects were placed on a more satisfactory footing, were, in more modern times, made by the Merchant Shipping Act, 1854, and by the numerous Acts by which that Act was, from time to time, amended; but all these earlier Acts have now been repealed, and their provisions consolidated, by the Merchant Shipping Act, 1894, which has itself been since frequently amended.

By this enactment, it is provided, that the Board of Trade shall have the general superintendence of all matters relating to wreck (d), which, for the purpose of the Act, includes things jetsam, flotsam, and ligam (e); and power is given to such Board, with the consent of

(a) On the coasts of the Baltic Sea, in particular, the inhabitants were long permitted to seize on whatever they could get as lawful prize (Stiern. *De Jure Suecon.* l. 3, cap. v).

(b) F. N. B. 112.

(c) 27 Edw. 3 (1353) st. 2, c. 13.

(d) As to wreck removed in order to free the navigation,

see Merchant Shipping Act, 1894, ss. 530–534; and as to floating derelict, see Derelict Vessels (Report) Act, 1896.

(e) The word ‘wreck’ in the Merchant Shipping Act, 1894 (s. 510), also includes ‘derelict’ found in or on the shores of the sea or any tidal water (*Cossman v. West* (1887) L. R. 13 App. Ca. 160).



the Treasury, to appoint ' receivers of wreck ' in different districts. These receivers are authorised to summon as many men as may be necessary, to demand help from any ship near at hand, or to press into their service any neighbouring waggons, carts, or horses, for the purpose of preserving or assisting any stranded or distressed vessel, or her cargo, or for the saving of human life ; and a penalty is established in case their demands are not complied with (*a*). The Act contains also copious provisions with reference to salvage for services rendered, and the manner in which the amount is to be assessed in case of dispute ; which is either made the subject of an action in the proper Division of the High Court of Justice, or, in cases below a certain amount, may be determined by the judge of a neighbouring county court, or before justices of the peace (*b*).

Any finder of wreck, other than the owner, must deliver the same, as soon as possible, to the receiver of the district ; and, even if such finder be the owner, he must give notice to that officer (*c*). If, before the expiration of a year, no owner establishes his claim to wreck so found, and no person, other than the Crown, is proved to be entitled to the same, it is then to be sold by the receiver. The proceeds thereof, after payment of all expenses and the salvage, if any, were originally paid to the Mercantile Marine Fund created or regulated by the Act (*d*) ; but are now, for the most part, paid into the Exchequer, and go to form a General Lighthouse Fund (*e*).

(*a*) Merchant Shipping Act, 1894, ss. 511–514.

(*b*) *Ibid.* ss. 547–549.

(*c*) *Ibid.* s. 518. This rule applies to wreck wherever found ; provided it is brought within the limits of the United Kingdom (Merchant Shipping Act, 1906, s. 72).

(*d*) Merchant Shipping Act,

1894, s. 525.

(*e*) Merchant Shipping (Mercantile Marine Fund) Act, 1898, s. 1. But such of the proceeds of wreck as belong to His Majesty in right of his duchy of Lancaster, or as belong to the duchy of Cornwall, form part of the revenues of those duchies respectively

Other provisions have also been made, with a view to prevent the disgraceful practice of *wrecking* which formerly obtained on some parts of our sea coasts ; for, by the Merchant Shipping Act of 1894 (*a*), continuing a like provision in the Act of 1854, if any ship, stranded or in distress on or near the shore, be plundered or damaged by persons riotously and tumultuously assembled together, compensation is to be made to the owner, by the police district, in or nearest to which the offence is committed, in the manner by law provided in cases of the destruction of churches and other buildings by riotous assemblages (*b*). Moreover, by the Larceny Act, 1861 (*c*), persons plundering or stealing wreck are made liable to penal servitude for fourteen years ; and, by the Malicious Damage Act, 1861 (*d*), persons exhibiting any false light or signal, with intent to bring a ship into danger, or doing any other malicious act tending to the immediate loss of a ship, may be sentenced to penal servitude for life (*e*).

3. [Treasure-trove (*thesaurus inventus*), is where any money, coin, gold, silver, plate, or bullion, is found hidden in the earth, or other private place ; the owner

(Merchant Shipping Act, 1894, s. 525). (As to salvage within the boundaries of the Cinque Ports, see the Cinque Ports Act, 1821, ss. 1–5, 15, 16 and 18 ; and the Merchant Shipping Act, 1894, s. 571.)

(*a*) S. 515.

(*b*) The provision for compensation for riotous damage to buildings is now contained in the Riot Damages Act, 1886. (See also the Malicious Damage Act, 1861, ss. 11, 12.)

(*c*) S. 64.

(*d*) S. 47.

(*e*) By the civil law, to

destroy persons shipwrecked, or to prevent their saving the ship, was punishable with death ; and to steal even a plank from a vessel in distress, or wrecked, made the party liable to answer for the whole ship and cargo (Dig. 47, 9, 3). In our own law, the provision previously in force on this subject (7 Will. 4 & 1 Vict. (1837) c. 89, s. 5) made this offence of wilfully bringing a ship into danger by false lights, &c., a crime punishable with death.

[thereof being unknown. The treasure so found belongs to the Crown ; but if he that hid it be known, or afterwards found out, the owner and not the Crown, is entitled to it (a). It is the hiding, we may observe, and not the abandonment, that gives the King the property ; as appears from Bracton's definition, that it is, in the words of the civilians, *vetus depositio pecuniæ* (b). For if a man scatters his treasure into the sea, or upon the surface of the earth, it belongs not to the Crown, but to the first finder (c).

Formerly, indeed, all treasure-trove, whether hidden, lost, or abandoned, belonged to the finder ; but afterwards it was judged expedient, for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the King. And such part was assigned to be all *hidden* treasure, being of the kind above stated, as distinguished from such as was either casually lost or designedly abandoned by the former owner. And that the prince shall be entitled to this hidden treasure is now grown to be, according to Grotius, *jus commune, et quasi gentium* ; for it is not only observed, he adds, in England, but in Germany, France, Spain, and Denmark (d). The finding of deposited treasure was much more frequent, and the treasures themselves more considerable, in the infancy of our constitution, than at present ; and the punishment of such as concealed from the King the finding of hidden treasure was formerly no less than death (e). Concealment of treasure-trove is still a misdemeanour at common law (f).

(a) 3 Inst. 132 ; Dalton, Inst. 133.

*Sheriffs*, ch. 16.

(b) L. 3, cap. 3, s. 4. (See, for a recent case on treasure-trove, *A.-G. v. Trustees of British Museum* [1903] 2 Ch. 598.)

(c) Bract. l. 3, cap. 3 ; 3

(d) *De Jure B. & P.* l. 2, cap. 8, s. 7.

(e) Glanv. l. 1, cap. 2 ; Craig, l. 16, 40 ; 3 Inst. 133.

(f) *R. v. Thomas* (1863) Le. & Ca. 313.

[4. Waifs (*bona waviata*) are such goods stolen as are waived, or thrown away, by the thief in his flight, for fear of being apprehended; and these are given by the law to the King, as a punishment upon the owner for not himself pursuing the felon, and taking away his goods from him (*a*). Wherefore, if the party robbed do his diligence immediately to follow and apprehend the thief, (which is called making *fresh suit*,) or do prosecute him to conviction, he shall have his goods again (*b*); also if the party robbed can retake them before they are seized for the Crown, though at the distance of twenty years, the Crown shall not have them (*c*). And if the goods are hid by the thief or left anywhere by him, so that he had them not about him when he fled, and therefore did not throw them away in his flight, they do not in such cases become *bona waviata*; but the owner may have them again when he pleases (*d*). And the goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs (*e*).

5. *Estrays* are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them; in which case the law gives them to the King, or now, most commonly, to the lord of the manor as special grantee from the Crown. But in order to vest an absolute property in the King or his grantees, estrays must be proclaimed in the church, and in the two market towns next adjoining to the place where they are found; and then, if no man claims them, after proclamation and a year and a day passed, they belong to the King or his grantee

(*a*) *Foxley v. Annesley*  
(1599) Cro. Eliz. 694; 5 Rep.  
109.

(*b*) Finch, L. 212.

(*c*) *Ibid.*

(*d*) *Foxley v. Annesley, ubi  
sup.*

(*e*) Fitz. Abr. tit. *Estray*,  
1; *R. v. Hanger* (1614) 3  
Bulstr. 19.

[without redemption (a), even though the owner be a minor, or under any other legal incapacity (b). If the owner claims them within the year and day, he must pay the charges of finding, keeping, and proclaiming them. The Crown or lord has no absolute property in such animals till the year and day passed; and so if a lord keepeth an estray three quarters of a year, and within the year it strayeth again, and another lord getteth it, the first lord cannot take it again (c). Any beasts may be estrays, that are by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses; all, indeed, which we in general call 'cattle' (d). But animals *feræ naturæ*, and not held by the antient law to be valuable, such as dogs or cats, bears or wolves, cannot be considered as estrays; though swans are said to be an exception to this rule (e). He that takes an estray is bound, so long as he keeps it, to find it in provisions, and to preserve it from damage (f); and he may not, it is said, use it by way of labour, but is liable to an action for so doing (g). But he may milk a cow, or the like; for that tends to the preservation, and is for the benefit of the animal (h).

VIII. Another branch of the ordinary revenue is the royal right to *mines*, a right which has its original from the King's prerogative of coinage, in order to supply him with materials; and therefore royal mines are only those of silver and gold (i). But by the old

(a) *Mirr.* ch. 3, s. 19.

(b) *Foxley's Case* (1601) 5 Rep. 109 a; Bro. Abr. *Estray*; *Brownlow v. Lambert* (1599) Cro. Eliz. 716.

(c) Finch, L. 177. Apparently the estray might be recovered from any one taking it away (*Dalton v. Barnard* (1618) Cro. Jac. 520).

(d) Fleta, l. 1, cap. 43.

(e) *Case of Swans* (1592) 7 Rep. 17 a.

(f) 1 Roll. Abr. 879.

(g) *Bagshawe v. Goward* (1605) Cro. Jac. 147.

(h) *Ibid.* 148; Noy, 119.

(i) 2 Inst. 577; *Att.-Gen. v. Morgan* [1891] 1 Ch. 432.

[common law, if gold or silver were found in mines of base material, according to the opinion of some, the whole was a royal mine, and belonged to the King ; though others were of the opinion, that it did so only if the quantity of gold or silver was of greater value than the quantity of base metal (a).] Now, however, by the 1 W. & M. (1688) c. 30, the 5 W. & M. (1693) c. 6, and the Crown Pre-emption of Lead Ore Act, 1815, it has been enacted, that no copper, tin, iron, or lead mines shall be deemed royal mines, whatever quantity of gold or silver may be extracted from them ; but that the King, or his grantees, may have the ore on paying for the same a price stated in the Act. So that private owners are not now discouraged from working mines, through a fear that they may be claimed as royal (b).

IX. and X. The two remaining branches of the Crown's ordinary revenue are those which arise from *escheats* and the *custody of idiots* ; but though in point of order they require here to be enumerated, the mere enumeration will suffice, as they have been both discussed, as far as the plan of the work permits, in former chapters (c).

XI. There was, until recently, another branch of the ordinary revenue, namely the forfeiture of a felon's lands and goods, which ensued on conviction. These were called *bona confiscata* by the civilians, because they belonged to the *fiscus* or imperial treasury ; but by our law they are called *bona forisfacta*, that is, such whereof the property is gone away from the owner. By the present law of England, however, no forfeiture of property takes place on the conviction of its owner for felony ; though, perhaps, it may still

(a) *Case of Mines* (1568) Plowd. 336.

(b) *Att.-Gen. v. Morgan, ubi sup.*

(c) As to escheats, see *ante*, bk. ii. pt. i. ch. xiv. ; and as to the Crown's custody of idiots, *ante*, ch. vi. pp. 618-619.

do so on criminal outlawry or *præmunire*. We need, therefore, now mention only one species of forfeiture, called a *deodand*, which arose from the misfortune rather than from the crime of the owner. [Any personal chattel which was the immediate and accidental occasion of the death of any reasonable creature was called a *deodand*, or thing which should be given to God, as a sort of expiation for the unwitting offence (*a*). Where a thing not in motion was the cause of a man's death, that part only which was the immediate cause was forfeited (*b*); but whenever the thing was in motion, not only that part which immediately gave the wound, but all things which moved with it, and helped to make the wound more dangerous, were included in the forfeiture (*c*). It mattered not whether the owner were concerned in the killing or not; for if A. killed B. with the sword of C., the sword was forfeited as an accursed thing (*d*). Hence, in all indictments for homicide, the value of the instrument of death as well as its description used to be found by the grand jury; to enable the Crown or its grantee to claim the *deodand*. But, no thing being a *deodand* unless it were presented as such by the jury (*e*), juries very frequently took upon themselves to mitigate these forfeitures, by finding only some trifling thing, or part of an entire thing, to have been the occasion of the death; and although such finding of the jury may have been hardly warrantable by law, the Court, in general, refused to interfere.] It being, however, obviously better that a law so repugnant to the feelings of mankind should be abandoned, than that the solemn

(*a*) Pollock and Maitland, *Hist. Eng. Law*, ii. p. 473, and the authorities cited in note (3) to that page.

(*b*) 1 Hale, P. C. 422.

(*c*) 1 Hawk. P. C. ch. 26.

(*d*) *Dr. & St. d.* 2, ch. 51.

(*e*) 3 Inst. 57; *R. v. Brownlow* (1839) 11 A. & E. 119; *R. v. Polwart* (1841) 1 Q. B. 818.

oath under which a juror gives his verdict should be thus evaded, it was enacted by the 9 & 10 Vict. (1846) c. 62, that from the 1st September, 1846, there should be no forfeiture of any chattel in respect of the same having moved to or caused the death of a man.

So far we have spoken of the ordinary revenue of the Crown, which, despite recent changes in the law, still stands upon a footing different from that of the extraordinary revenue. For although this ordinary revenue is now, by virtue of arrangements made with successive monarchs at their accession (*a*), surrendered to Parliament in return for a Civil List, and, as part of what is, in substance, the national revenue, paid into the Consolidated Fund ; yet it differs from the extraordinary revenue in this most important respect, that it is not the result of parliamentary enactment, but the creature of immemorial custom. And although it is at present merged in the national income, as part of that arrangement by which the monarch receives a fixed annual sum for his personal expenditure, instead of the casual and uncertain produce of the ancient prerogative rights of the Crown, yet it should be observed, that the statutes by which this arrangement has been effected are careful to confine it to the lifetime of the King or Queen by whom it is sanctioned. In theory, therefore, it would be open to any future monarch, at his accession, to insist upon his ancient rights (*b*).

#### THE EXTRAORDINARY REVENUE OF THE CROWN.

This is the revenue from *taxation*, which at one time was looked upon as an exceptional resource, but has now, for at least three centuries, been a regular feature of national economy.

[Contributions by way of taxation, which have been diversely called by the names of *aids*, *subsidies*,

(*a*) *E.g.*, Civil List Acts, 1837, 1901, and 1910.

(*b*) As to the Civil List, see *post*, pp. 681–682.



[and *supplies*, are granted on the request of the Crown, by the Commons of Great Britain and Ireland in Parliament assembled; who, after they have, in *committee of supply*, voted a supply to the Crown, and settled the *quantum* of that supply, resolve themselves into what is called a *committee of ways and means*, to consider the ways and means of raising the supply so voted. In this committee, any member may propose such scheme of taxation as he thinks will be least detrimental to the public; though this matter is looked upon as the peculiar province of the Chancellor of the Exchequer, to whom it belongs to bring forward annually his Budget, *i.e.*, his financial statement for the year (*a*).]

The following are the chief taxes now imposed by law, namely,—I. The Land Tax; II. The Customs; III. The Excise (including Excise-Licence Duties); IV. The Post-Office Duties; V. The Stamp Duties (including the Death Duties); VI. The Duty on Offices and Pensions; and VII. The Income Tax.

I. [*The Land Tax*.—This has come in the place of the antient tenths or fifteenths, subsidies, scutages, and tallages, a brief explanation of which shall here be given. *Tenths* and *fifteenths* were temporary aids issuing out of personal property and granted to the King by Parliament (*b*); and they were formerly the real tenth or fifteenth part of all the moveables belonging to the subject, at a time when such moveables were a much less considerable thing than they are at this day. Tenths are said to have been first granted under Henry the Second; but afterwards fifteenths were more

(*a*) It is not open to any one but a Minister of the Crown to *propose* a grant; for grants are only made on the request of the Crown. But, when it has been re-

solved to make a grant, it is open to any member to suggest how the grant shall be provided. (See *ante*, p. 523.)

(*b*) 2 Inst. 77; 4 Inst. 34.

[usually granted than tenths. Originally the amount of these taxes was uncertain, as they were levied by assessments newly made at every fresh grant of the Commons, a commission for which is preserved by Matthew Paris (*a*) ; but it was at length reduced to certainty, in the eighth year of Edward the Third (1334), when, by virtue of the King's commission, taxations were made of every township, borough, and city in the kingdom, which were recorded in the Exchequer, and such rate was, at the time, the fifteenth part of the value of every shire, and the tenth part of every borough—the whole amounting to about 29,000*l.* (*b*). The name of a tenth and a fifteenth was still kept up ; although, by the increase of personal property, things came to be in a very different situation. And thus when, of later years, the Commons granted the King a fifteenth, every parish in England immediately knew its proportion of the tax ; for it was the same identical sum that was assessed by the same aid, in the eighth year of Edward the Third. And each parish raised it by a rate among themselves and returned it into the Exchequer. A tenth and fifteenth appear to have been last granted in 1623.

The other antient levies above specified were taxes on the real, and not on the personal, estate, and were in fact in the nature of a land tax. Every tenant of a knight's fee, it will be remembered, was bound, if called upon, to attend the King for forty days in each year (*c*). This personal attendance growing troublesome, the tenants found means of compounding for it, first by sending others in their stead, and in process of time by making a pecuniary satisfaction to the Crown in lieu of it. The pecuniary satisfaction at last came to

(*a*) A.D. 1232.

(*b*) This is Blackstone's estimate. Later researches tend to show that it is too small.

(See Stubbs, *Constitutional History* (3rd edn.), ii. 579.)

(*c*) *Ante*, vol. i. pp. 114, 122.

[be levied by assessments, at so much for every knight's fee, under the name of *scutage* ; and these were levied for the first time in 1156 (*a*), and confirmed in the fifth year of Henry the Second (1159), on account of his expedition to Toulouse. Such assessments were then mere arbitrary compositions, and were sometimes levied on the landholders by the royal authority only, to the great impoverishment and vexation of the people ; wherefore King John was obliged to promise in his Magna Carta (*b*), that no scutage should be imposed without the consent of the common council of the realm, and in the charters of Henry the Third it was stipulated, that scutages should be taken only as they were used to be taken in the time of King Henry the Second (*c*). And afterwards, by a variety of statutes under Edward the First and his grandson (*d*), it was provided, that the King should not take any aids or tasks, any tallage or tax, but by the common assent of the great men and Commons in Parliament.

Of the same nature with scutages upon knights' fees were the assessments of *hidage* upon all other lands, and of *tallage* upon cities and burghs (*e*) ; but they all gradually fell into disuse upon the introduction of *subsidies*, about the time of King Richard the Second and King Henry the Fourth.

*Subsidies* were a tax, not immediately imposed upon property, but upon persons in respect of their reputed estates, after the nominal rate of 4s. in the pound for lands, and 2s. 8d. for goods ; and for those of aliens in a double proportion. It was antiently the rule, never to grant more than one subsidy and two fifteenths at a time. But afterwards, as money sank

(*a*) Stubbs, *op. cit.* p. 491.

(*b*) Cap. 12 (ed. Stubbs).

(*c*) 9 Hen. 3 (1225) c. 37.

(*d*) Confirmatio Cartarum  
(1297) cc. 5-7 ; 34 Edw. 1

(1306) st. 4, c. 1 ; and 14  
Edw. 3 (1340) st. 2, c. 1.

(*e*) Madox, *Hist. Exch.* 480 ;  
Stubbs, *op. cit.* ii. 549.

[in value, more subsidies were given ; as many as twelve subsidies, to be levied in three years, being demanded of the Commons in the first Parliament of 1640.

The grant of scutages, tallages, or subsidies, by the Commons, did not extend to spiritual preferments ; the clergy in those days taxing themselves. A subsidy granted by the clergy was according to the valuation of their livings in the King's books ; and, at the rate of 4s. in the pound, amounted to about 20,000*l.* (*a*). But the last subsidies thus separately given by the clergy were those granted in the 15 Car. 2 (1663) ; since which time, another method of taxation has generally prevailed, which takes in the clergy as well as the laity. In recompense for which, as already mentioned, the clergy have from that period been allowed to vote at the election of members of Parliament in respect of their benefices (*b*) ; and the practice of giving ecclesiastical subsidies has fallen into total disuse.

No subsidies were granted either by laity or clergy after the year 1670 (*c*) ; but periodical assessments of a specific sum upon each of the several counties of the kingdom, to be levied by a pound rate on lands and personal estates, were granted as the national emergencies required, according to the method adopted during the Commonwealth. These periodical assessments, as also the subsidies which had preceded them, and the scutages, hidages, and tallages before mentioned, were to all intents and purposes, so far as they were charged on land, a land tax ; and they were sometimes expressly so called (*d*). Yet a popular opinion has prevailed, that the land tax was first introduced in the reign of King William the Third ;

(*a*) 4 Inst. 33.

(*b*) Dalt. *Sheriffs*, 334 ; Gilb. *Hist. of Exch.* ch. 4.

(*c*) The latest were by 22 &

23 Car. 2 (1670) c. 3.

(*d*) Com. Journ. 26th June, 9th Dec. 1678.

[because, in the year 1692, a new assessment or valuation of estates was made throughout the kingdom. It was upon the new valuation so made, that the land-tax was imposed by the 4 W. & M. (1692) c. 1; and the tax has ever since continued a permanent charge upon land (a).] For, by the Land Tax Perpetuation Act, 1798, this tax, which had long been an annual charge, was converted into a perpetual one, and was fixed at four shillings in the pound, a particular sum being charged on each county in accordance with the valuation referred to; and the proportion payable by each individual is assessed by commissioners appointed under statute (b).

Under the Finance Act, 1896 (c), the land tax is now at a rate not exceeding one shilling in the pound on the annual value; and under the Finance Act, 1898 (d), any person whose annual income does not exceed 160*l.* is exempt from the whole, and any person whose income does not exceed 400*l.* is exempt from half, of any land tax payable by him. The land tax is subject to redemption by the landowner (e); and although the tenant of the land is, by the Land Tax Act, 1798 (f), liable to a distress, in the event of the tax remaining in arrear, he is yet, by the same enactment, entitled to deduct the amount which he has paid for it (unless he has expressly agreed to pay all taxes), out of the first sum that shall become due for rent—the tax being as, between landlord and tenant,

(a) Under the 4 W. & M. (1692) c. 1, the sum granted was levied on *personal* as well as on landed property; but this was altered by the 3 & 4 Will. 4 (1833) c. 12.

(b) Land Tax Commissioners Acts, 1827 and 1906.

(c) S. 31 (2).

(d) S. 12.

(e) Land Tax Redemption

Acts, 1802, s. 180, 1805 and 1817; Land Tax Redemption (Investment) Act, 1853, s. 8; Land Tax Redemption (No. 2) Act, 1853; Finance Act, 1896, ss. 32, 33; *Kilderbee v. Ambrose* (1854) 10 Exch. 454; *Whidborne v. Ecclesiastical Commissioners* (1877) 7 Ch. D. 375.

(f) S. 17.

a charge upon the former, in the absence of any special engagement. Yet if the tenant has, to any extent, a beneficial interest, and does not hold at a rack-rent, he becomes liable *pro tanto*, and can only charge the residue on his landlord; the tax being one imposed by the law on the beneficial proprietor of the land (a).

Of somewhat similar nature to the Land Tax are the Land Values Duties imposed by the Finance (1909-10) Act, 1910. Of two of these, viz., the 'reversion duty' and the 'increment value duty,' we have previously spoken (b). It remains to allude to the 'undeveloped land duty' and the 'mineral rights duty.'

The undeveloped land duty is an annual tax payable, at the rate of one halfpenny for every twenty shillings, on the 'site' value, as defined by the Act, of land (not including minerals) (c) which has not been developed by the erection of dwelling-houses, or of buildings for the purposes of any business, trade, or industry other than agriculture (but including glass houses or green-houses) (d), or is not otherwise used *bonâ fide* for any business, trade, or industry other than agriculture (e). But there is an allowance for expenditure incurred during the previous ten years on roads and sewers with a view to development (f); and, where increment value duty has been paid on any undeveloped land, the site value of that land will be reduced, for the

(a) *Graham v. Wade* (1812) 16 East, 29; *Queen v. Land Tax Commissioners* (1853) 2 El. & Bl. 694; *Charing Cross Bridge Company v. Mitchell* (1855) 4 El. & Bl. 549; *Lord Colchester v. Kewney* (1867) L. R. 2 Exch. 253; also Land Tax Redemption Acts, 1802 and 1814; Land Tax Act, 1834; Land Tax Redemption Act, 1838; Land Tax Act, 1842; Revenue Act, 1869,

Part II.

(b) See *ante*, vol. i. pp. 212-213, and 582.

(c) Finance (1909-10) Act, 1910, s. 16 (4).

(d) Presumably this means that land on which such buildings are erected will not be 'undeveloped.'

(e) Finance Act, 1910, s. 16 (1).

(f) *Ibid.* s. 16 (2) (b).

purposes of undeveloped land duty, by a sum equal to five times the amount paid for increment value duty (a).

The mineral rights duty is likewise an annual tax, payable on the rental value of all rights to work minerals and of all mineral wayleaves, at the rate of one shilling for every twenty shillings value (b). It will be observed that this general statement, which follows the words of the Act, treats the 'rental value' of the 'rights to work minerals' as the basis of assessment; but the later provisions of the section seem to contemplate only assessment of such rights as are actually being exercised, either by the proprietor or a lessee. Moreover, no reversion duty is chargeable on the determination of a mining lease; and no increment value duty is chargeable on the grant of a mining lease (c).

II. [*The Customs*.—These are the duties, toll, tribute, or tariff payable upon merchandise exported and imported. The considerations upon which this revenue was vested in the King have been said to be two (d): (1) because he gave the subject leave to depart the kingdom, and to carry his goods along with him; and (2) because the King was bound, of common right, to maintain and keep up the ports and havens, and to protect the merchant from pirates. However this may be, the right of the Crown to these customs clearly originated in the grant of Parliament (e); and by the *Confirmatio Cartarum* of 1297 (f), the King promises to take no customs from merchants without the common assent of the realm, "saving to us and "our heirs the customs on wool, skins, and leather, "*granted before by the commonalty aforesaid*" (in

(a) Finance Act, 1910, s. 16 (3).

(b) *Ibid.* s. 20 (1).

(c) *Ibid.* s. 22 (1).

(d) *Case of the London Merchants* (1559) Dyer, 165 b.

(e) 2 Inst. 58, 59.

(f) 25 Edw. 1, st. 1, c. 7.

[1275). On this account these duties on wool, skins, and leather have been called the hereditary customs of the Crown; and the said three commodities were styled the *staple* commodities of the kingdom, because they were obliged to be brought to those ports where the King's staple was established, in order to be there first rated and then exported. These duties were also called *custuma antiqua sive magna*; and they were payable by every merchant, as well native as stranger. But there was also another duty, known as the *custuma parva et nova*, which was an impost of ten shillings on the sack of wool, and of threepence in the pound, due from merchant strangers only, for all commodities, as well imported as exported. This was usually called the *alien's duty*, and was first granted in the thirty-first year of Edward the First (1303) (a). It has long since been abolished.

There is also another very antient hereditary duty, or custom, belonging to the Crown, called the *prisage* or *butlerage* of wines (b); the Crown being entitled, under the name of this duty, to take two tuns of wine, one before and one behind the mast, from every ship, English or foreign, importing into England twenty tuns or more. But, by a charter of Edward the First, the duty of prisage was exchanged into a duty of two shillings for every tun imported by merchant strangers, and was then called butlerage, because paid to the King's butler (c).

Other customs payable upon exports and imports were distinguished into 'subsidies,' 'tunnage,' 'poundage,' and other imposts. *Subsidies* were such as were imposed by Parliament upon any of the staple commodities before mentioned, over and above the

(a) 4 Inst. 29.

(1614) 2 Bulstr. at p. 254;

(b) Madox, *Hist. Exch.* 526,  
532.Stat. of Estreats, 16 Edw. 2  
(1323); Com. Journ. 27th(c) *Kennycott v. Bogen*

April, 1689.



[*custuma antiqua et magna* ; *tunnage* being a duty upon all wines imported, over and above the prisage and butlerage aforesaid, while *poundage* was a duty imposed *ad valorem*, at the rate of twelve pence in the pound, on all other merchandise whatsoever. Other imposts were occasionally laid on by Parliament as the circumstances of the time required. The imposts of *tunnage* and *poundage* in particular were first granted for the defence of the realm, and for the intercourse of merchandise safely to come into and pass out of the same (a) ; and were at first usually granted only for a stated term of years, as for two years in the fifth year of Richard the Second (b). But in the times of Henry the Fifth and his son, and again in Edward the Fourth's time, they were granted to the King for life (c). After that time they were regularly granted for life, sometimes at the first, sometimes at other subsequent Parliaments of each reign, till the reign of Charles the First ; when, as Lord Clarendon expresses it, his Ministers were not sufficiently solicitous for a renewal of the legal grant (d). And yet these imposts were thereafter levied and taken unconstitutionally, and without the consent of Parliament, for fifteen years together ; which was one of the causes of those unhappy discontents, justifiable at first in too many instances, but which degenerated at last into causeless rebellion and murder. For the King, previously to the commencement of hostilities, gave the nation satisfaction for the error which had been committed ; when, by the 16 Car. 1 (1640) c. 8, he renounced the power of levying these duties without the consent of Parliament.

Upon the Restoration, these duties were consolidated and granted to King Charles the Second for life ; and

(a) 1 Eliz. (1559) c. 20.

(c) Stubbs, *op. cit.* iii. pp.

(b) Stubbs, *Constitutional* 88, 168, 205.

*History*, ii. pp. 445, 557.

(d) *Hist.* b. 3.

[the like grant was made to his two immediate successors. But afterwards, by three several statutes, 9 Anne (1710) c. 11 ; 1 Geo. 1 st. 2 (1714) c. 12, and 3 Geo. 1 (1717) c. 7), the duties were made perpetual, and mortgaged for the public debt.] Finally, in the year 1787, was passed the Customs Consolidation Act (*a*), by which the amount of the duties and the articles on which they should be levied were defined. The law of customs, thus simplified and consolidated, was in the reign of William the Fourth reduced into several statutes repealing all former provisions, and forming a new code upon the subject. But these statutes were themselves afterwards repealed; and the enactments at present in force will be found chiefly in the Customs Tariff Act, 1876, and the Customs Consolidation Act, 1876, as amended in detail by many subsequent statutes.

It is needless to observe, that the number of articles of merchandise and the rates of taxation, included in the customs duties, have varied infinitely from age to age, according to the fiscal views of the time. At present, both the rate of duty and the number of articles on which duty is levied, are very small. But it is important to notice that whereas, as a matter of practice, these duties are mostly imposed by statutes which continue obligatory until they are repealed or amended, and thus most customs duties may be described as ‘permanent,’ yet care is always taken, for special reasons, to impose at least one important class of duties (usually that on tea) only from year to year. Such duties are therefore known as ‘annual’ or ‘supply’ services; and serve the double purpose of enabling the Chancellor of the Exchequer to balance the national income and expenditure, and of enabling the House of Commons, by the necessity for an annual vote, to keep control over the Chancellor of the Exchequer.

(*a*) 27 Geo. 3, c. 13.

III. *The Excise*.—This is directly opposite in its nature to the customs duties ; for it is an inland imposition, paid sometimes on the consumption of the commodity, frequently upon the retail sale. Inasmuch as this duty is peculiarly liable to evasion, the officers of the revenue have a power to enter and search the places of business of such as deal in exciseable commodities, at any hour of the day, and, in the presence of a constable, of the night also. And excise offences are summarily dealt with, either before the commissioners of revenue or before justices of the peace ; subject, in either case, to an appeal.

The relationship of excise to customs duties is always of great importance ; though the views taken of it naturally vary with the fiscal policy followed by the country at any given time. Thus, for example, if the desire of Parliament is to favour British manufacturers at the expense of the nation at large, customs duties will be placed on articles coming from abroad which could be manufactured in the United Kingdom, but no corresponding or ‘countervailing’ excise duties on articles produced at home will be levied. If, on the other hand, Parliament takes the view that open competition between British and foreign manufacturers will, in the long run, produce the best results for the country, then, on every article which is taxed at the Custom House, it will place a ‘countervailing’ excise duty on the articles of the same class manufactured in the United Kingdom.

[The excise was originally established, by an Ordinance of the Long Parliament, in 1643 ; with the intention that it should continue only till the end of the civil war. At first it was laid only on beer, ale, cider, and perry (*a*) ; but it was soon afterwards imposed on wine, tobacco, sugar, and a great multitude of other commodities (*b*). Upon King Charles’s

(*a*) Com. Journ. 17th May, 1643.      (*b*) *Ibid.* 27th May, 1643.

[restoration, it having been long established, and its produce well known, some part of it was given to the Crown, by way of purchase, as was before mentioned, for the feudal tenures and other oppressive parts of hereditary revenue.] Since that period it has constantly formed part of the taxes of the nation, being, however, now limited to beer, spirits, chicory, coffee, glucose, and saccharin; though, under recent Acts of Parliament, many imposts, which are not properly in the nature of excise, have been classed, for greater convenience of collection, under this head of duties, *e.g.*, dog licences (*a*), gun licences (*b*), and game licences (*c*), the licences of appraisers and house-agents, pawnbrokers, hawkers, pedlars, and the like. To this branch of the revenue there have also been assigned the duties on stage and hackney carriages, on railway passengers, on race-horses, and on wine licences and refreshment houses (*d*); also, all the duties which used to be known by the name of the *assessed taxes*—these last being duties assessed and charged upon persons in respect of the houses they inhabit, and of certain articles by them used or kept (*e*). Such assessed taxes comprise also the duties on male servants, on private carriages, and on armorial bearings (*f*). The collection of all these taxes is now regulated by the Taxes Management Act, 1880; and any one liable to pay who fails to pay them, may, in default of a sufficient distress to answer them, be committed to prison until payment, upon an order to that effect of two of the Inland Revenue Commissioners (*g*).

(*a*) Dog Licences Act, 1867;  
Customs and Inland Revenue  
Act, 1878, s. 17.

(*b*) Gun Licence Act, 1870.

(*c*) Game Act, 1831; Game  
Licences Act, 1860.

(*d*) Refreshment Houses  
Act, 1860.

(*e*) Revenue Act, 1869, s.  
18.

(*f*) Revenue Act, 1869, Part  
V.; Customs and Inland  
Revenue Act, 1888, s. 4.

(*g*) Revenue Act, 1869, s.  
30; Taxes Management Act,  
1880, ss. 86–91.

IV. [Another source of the revenue is the *Post Office*. This, like the excise, was first established in 1643 ; having been invented or organised by Prideaux, Attorney-General to the Commonwealth, who was appointed Postmaster-General (*a*). When the Common Council of London endeavoured to erect an opposition post office, the House of Commons declared that the office of Postmaster is, and ought to be, in the sole power and disposal of Parliament (*b*) ; and in 1656 a regular Post Office was erected, by the authority of the Protector and his Parliament, on nearly the same model as has been ever since adopted, and with the same rates of postage as continued till the reign of Queen Anne (*c*).] But the rates have been, of course, since altered, and many further regulations added, by many subsequent statutes ; and the management of the Post Office, the appointment and powers of the Postmaster-General, and the regulation and definition of offences specially connected with the Post Office, are now, with many other kindred matters, governed by the great consolidating Post Office Act, 1908.

Probably, no more eligible method of raising money upon the subject can be devised than this Post Office tax ; and the system has been, in recent years, very largely and diversely extended. Thus, in the year 1840, by the Post Office (Duties) Act, of that year, the privilege formerly exercised by all members of Parliament, of *franking*, or sending and receiving letters free of duty, was wholly abolished. Since that year the postage has been gradually reduced to an uniform rate, irrespective of distance ; and amounts at present to the sum of only one penny for every letter conveyed between places in the United Kingdom, provided it

(*a*) Com. Journ. 7th Sept.  
1644 ; 21st Mar. 1649.

(*c*) See the Act in Scobell,  
511.

(*b*) *Ibid.*

does not exceed four ounces in weight. The rate to the United States of America, Egypt, British Possessions, and the British Postal Agencies in China and Morocco, is one penny the ounce; and other foreign letters are carried at the rate of twopence halfpenny for the first ounce, and one penny halfpenny for every ounce after the first. In further development of the system, books, newspapers, and other postal packets are now also carried, at low rates of postage in proportion to the weight conveyed; and, since the year 1875, *post cards* (*i.e.*, open letters) have come into use, bearing a halfpenny stamp only (*a*). The produce arising from this branch of the revenue is steadily increasing.

The machinery of the Post Office is also now used for the management of that class of savings bank which is called the Post Office Savings Bank (*b*), for the issuing of money orders and of postal orders (*c*), for the granting of small life insurances and life annuities (*d*), and for the conveyance of small parcels by parcel post (*e*). For a considerable number of years, the Post Office has also had the direction of the electric telegraphs of the kingdom (*f*); and it has recently taken over the working of the telephones (*g*). Finally, it has undertaken very heavy duties in connection with the administration of the Old Age Pensions

(*a*) Post Office Act, 1875, s. 1 (now repealed); and (as to reply post cards) see the Post Office (Reply Post Cards) Act, 1882.

(*b*) For an account of this, see *post*, bk. iv. pt. iii. ch. xv. vol. iii. pp. 245–247.

(*c*) Post Office (Money Orders) Acts, 1848 to 1906.

(*d*) Government Annuities Act, 1882.

(*e*) Post Office (Parcels) Act, 1882.

(*f*) The Telegraph Acts, 1863 to 1904, include Acts of the following years, viz.:—1863, 1866, 1868, 1869, 1870, 1878, 1885, 1889, 1892, 1897, 1899, and 1904. It was by the Act of 1885 that the minimum rate for inland telegrams was reduced to sixpence. See also the Wireless Telegraphy Acts, 1904 and 1906.

(*g*) Telephone Transfer Act, 1911.

Acts of 1908 and 1911 (*a*), and the National Insurance Act of 1911 (*b*), of which some account will hereafter be given (*c*).

V. A fifth branch of the revenue (also under the management of the Commissioners of Inland Revenue) consists in the *Stamp Duty*, which is a tax imposed upon a great variety of legal and other documents (*d*), and also upon cards and dice (*e*). The first institution of the stamp duties was by the 5 & 6 W. & M. (1694) c. 21; but they have long since been increased vastly beyond the original design (*f*).

There are also now four specific classes of duties on property, commonly called the 'Death Duties,' classed under this branch of the revenue, which are of such importance as to deserve a particular mention, viz., the duty payable under the Legacy Duty Acts (*g*); the duty

(*a*) Old 'Age Pensions Act, 1908, s. 10.

(*b*) S. 42, &c.

(*c*) See *post*, pt. iii. (vol. iii. pp. 138, and 229-232).

(*d*) See the Common Law Courts (Fees) Act, 1865; as to *court fees*, the Judicature Act, 1875, s. 26; as to *finer* and *fees* to local authorities, the Local Stamp Act, 1869; and as to fees to public officers generally the Public Offices Fees Act, 1879.

(*e*) Revenue Act, 1862, ss. 27-37.

(*f*) The principal Stamp Acts are the Stamp Acts, 1815 and 1891, which latter consolidates the law and repeals the Stamp Act, 1870, and many other Acts relating to stamp duties, and has been amended by the Revenue Act, the Stamp Duties Manage-

ment Act, 1891, the Customs and Inland Revenue Act, 1893, ss. 3, 4, the Finance Act, 1894, ss. 39, 40, and the Finance Acts of 1895 to 1906. See also the following statutes containing enactments on this subject: Demise of the Crown Act, 1830; London Hackney Carriage Act, 1831; Stage Carriages Act, 1832; Oxford University Act, 1855; Cambridge University Act, 1858; Revenue Act, 1867, ss. 20-24; Revenue, Friendly Societies, and National Debt Act, 1882, Part II.; Customs and Inland Revenue Act, 1885, Part II.; Revenue Act, 1903, ss. 5-9; and Revenue Act, 1906, s. 10.

(*g*) See the Legacy Duty Acts, 1796 and 1805; Stamp Act, 1815, sched.; Revenue Act, 1845, s. 4.

payable under the Succession Duty Act, 1853 (*a*); the Estate Duties payable under the Finance Act, 1894 (*b*), and the duties on land, or 'Land Values' Duties payable under the Finance Act, 1910. The nature of these duties has, however, been already sufficiently explained (*c*).

VI. The last branch but one of the revenue to be here noticed, is the duty which is charged upon offices of profit and pensions payable by the Crown, exceeding the value of 100*l.* per annum—a duty which was first imposed in the reign of George the Second (*d*); and, after having been from time to time continued, was made perpetual by the Duties on Offices and Pensions Act, 1836 (*e*).

VII. The taxes of which notice has now been taken are those which are (with the modification previously alluded to (*f*)) permanently fixed upon the subjects of this realm; but in the year 1842, the revenue being insufficient to meet the public expenditure, it was thought proper to revive, with some modifications, a tax of which there are traces in the first half of the fifteenth century, but which after that time fell into disuse till again resorted to by Pitt in 1799. This—the Income Tax—was, however, dropped in 1802, revived in 1803, and again abolished in 1816. Finally, by the Income Tax Act, 1842, this tax was re-imposed on the

(*a*) Amended by the Customs and Inland Revenue Acts, 1888, s. 21, and 1889, ss. 10–15, and the Finance Act, 1910, s. 58.

(*b*) Amended by the Finance Acts, 1896, 1898, 1900, 1907, 1910, 1911, and 1912.

(*c*) As to estate duty, succession duty, and increment value duty, see *ante*, bk. ii.

pt. i. ch. xxvi. (vol. i., pp. 560–581). As to legacy duty, *ibid.* pt. ii. ch. vii. (*ante*, pp. 344–347). As to the other land value duties, see *ante*, pp. 663–664).

(*d*) Pension Duties Act, 1757.

(*e*) See Customs and Inland Revenue Amendment Act, 1877.

(*f*) See *ante*, p. 667.



yearly profits arising from property, professions, trades, and offices ; and by frequent renewals up to the present time, its existence has been prolonged, though the rate in the pound has been the subject of variation in the successive Acts, now become annual, by which the tax itself has been continued (*a*).

In connection with the collection of income tax, a curious legal question has recently arisen, which has necessitated the intervention of Parliament. It had long been the practice for the Chancellor of the Exchequer, in making his annual financial statement in the House of Commons, to announce the precise rates at which he proposed to ask the House to fix the income tax and the 'annual' or 'supply' duties (*b*) for the forthcoming year. As the Finance Act is usually a complicated measure, which is not passed until towards the close of the session, it was the further practice for the House to resolve at once that these new duties, when imposed, should be retrospective in their operation, in order that they might be collected at once ; and, on the strength of the resolution thus passed, it was the practice of the Customs and Inland Revenue officials to act as though they had legal authority to collect accordingly. But, of course, no taxes can be legally enforced until they have been embodied in an Act of Parliament passed through all the proper stages ; and, in the year 1912, Mr. Gibson Bowles, from whose dividends the Bank of England had deducted the income tax voted, but not formally enacted, sued the Bank for the recovery thereof. The court upheld

(*a*) The two chief Income Tax Acts are those of 1842 and 1853, which contain the general rules for levying and assessing the tax. The amending Acts have been almost innumerable ; but we cannot do

more than refer to the Finance Act, 1907, which introduced (s. 19) the principle of taxing earned income on a lower rate than that applied to income from investments.

(*b*) See *ante*, p. 667.

Mr. Bowles' contention (a) ; and it therefore became necessary to provide by law for the continuance of a practice which was deemed necessary for the proper collection of the revenue. Accordingly, by the Provisional Collection of Taxes Act, 1913, it is enacted, that when the Committee of Ways and Means (being a Committee of the whole House) has resolved to vary an existing tax or to impose a new tax, and the resolution contains a declaration that it is expedient in the public interest that the variation or new imposition shall have statutory effect under the provisions of the Act, the resolution shall have statutory effect accordingly as from its passing. But the limit of such statutory effect is four months ; and it ceases altogether if it is not agreed to by the House within ten sitting days after it is passed, and if a Bill embodying it is not read a second time within the next twenty sitting days after such agreement is arrived at, or if Parliament is dissolved or prorogued, or if the provisions giving effect to the resolution are rejected during the passage of the Bill embodying them through the House. Moreover, the Act only applies to resolutions for the imposition of customs and excise duties, and income tax (b) ; and, of course, any money collected under it must be returned to the person paying such money, if the statutory effect of the resolution comes to an end before it is confirmed by the passage of an Act of Parliament embodying it (c).

All of the above taxes are levied to discharge the

(a) *Bowles v. Bank of England* [1913] 1 Ch. 57.

(b) S. 3.

(c) S. 1 (c). (There is a further provision (s. 2) for the

repayment of money paid within a month after the expiry of a temporary tax, in the event of such tax not being renewed.)

expenses annually incurred by the Government, in respect of the public services, including therein the maintenance of the royal dignity ; and a very large proportion of these expenses consist in payments made on account of the interest of the *National Debt*, a subject of which it is proper therefore to take some notice in this place.

The National Debt is in part *funded* and in part *unfunded* ; the former being that which is secured to the national creditor upon the public funds (the nature of which will be presently explained), and the latter, that which is not so provided for. The unfunded debt is, as compared with the funded debt, ordinarily but of small amount ; and is secured by treasury bills, war stock and bonds, and exchequer bonds. Treasury bills are instruments issued by the Bank of England under warrant from the Treasury, in accordance with Acts of Parliament passed for the purpose. They are issued for three, six, nine, or twelve months, and are put up to tender, and sold at a discount, and thus do not carry interest (*a*). But of the funded debt, a more particular account must here be attempted.

[In order to a proper view of this part of the National Debt, it must be borne in mind, that, after the Revolution, when our new connexions with Europe introduced a new system of foreign politics, the expenses of the nation, not only in settling the new establishment, but in maintaining long wars on the continent for the

(*a*) Treasury bills issued under the authority of Parliament are charged upon and paid out of the Consolidated Fund ; as to them, see the Exchequer and Treasury Bills Acts, 1866 and 1877, the National Debt Act, 1889, s. 5, the Bank Act, 1892, ss. 3, 4 ; the Revenue Act, 1906, s. 10 ;

the annual Consolidated Fund Acts ; and H. of C. Paper clxxxvii. of 1889. Treasury bills have taken the place of Exchequer bills, which, after an existence of 200 years, ceased to be issued in 1861, and were finally paid off in 1896-7.

[security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the House of Austria, maintaining the liberties of the Germanic body, and other kindred purposes, increased to such an unusual degree, that it was not thought advisable to raise all the expenses of any one year by taxes to be levied within that year; lest the unaccustomed weight of them should create murmurs among the people. It was therefore the policy of those times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the State, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so borrowed; by this means converting the principal debt into a new species of property, transferable from one man to another at any time and in any quantity.] This policy of the English Parliament was the first commencement of what is called the National Debt. The debt has since been largely increased owing to divers successive emergencies; and, notwithstanding certain provisions for its gradual reduction, it amounted on the 31st March, 1913, to 593,453,857*l.* 2*s.* 10*d.* (a).

The form of the security held by the public creditors, in respect of the funded debt, is that of annuities granted by Parliament to those who originally advanced the money, and granted for the most part in perpetuity, affording a certain rate of interest for ever upon the principal sum due. These annuities are called the *public funds*; and they are transferable by the holder, and pass by law to his representatives, being subject, in every material particular, to all the incidents ordinarily attaching to other personal

(a) This does not include the value in stock of terminable annuities, of which (at the same date) the estimated capital value was 31,519,908*l.*, nor other miscellaneous capi-

tal liabilities amounting to 31,500,000*l.* (See the Finance Accounts for the year ending 31st March, 1913, in H. of C. Paper of 1913, No. 173.)

property (a). The annuitants have no right to call for the payment of the principal of the debt (*i.e.*, to have their annuities redeemed), although the Government has always the right of redemption; and this right on the part of the Government has been exercised to a very considerable extent under the provisions of the National Debt (Conversion) Act, 1888 (b), whereby the stock theretofore called the New Three per cents. was converted into a new stock to be called  $2\frac{3}{4}$  per cent. Consolidated Stock till the 5th April, 1903, and to be called  $2\frac{1}{2}$  per Cent. Consolidated Stock after that date. In the same Act, as supplemented by the National Debt Redemption Act, 1889 (c), are contained provisions for the compulsory redemption of all existing Consolidated Three per cent. stock and Reduced Three per cent. stock, and for the corresponding increase of the new stocks created under the National Debt (Conversion) Act, 1888, just referred to. And by the National Debt Redemption Act, 1893, the like provision was made for the redemption, after the 5th January, 1894, of the New Three Pounds Ten Shillings per cent. annuities, referred to in the Act; which were made redeemable after that date by the National Debt Act, 1870.

The National Debt is, doubtless, a heavy burden upon the state; and if England were a poor country, it would be an intolerable burden. But it is nevertheless, according to some economists, a great benefit to the whole nation, affording, as it does, a ready, safe, and easily convertible species of investment for the

(a) In the National Debt Act, 1870, there are a variety of enactments relating to the National Debt, having reference chiefly to the payment of dividends, and to unclaimed dividends, and to the issue to stockholders of stock

certificates with coupons annexed made payable to bearer.

(b) Amended by the National Debt (Supplemental) Act, 1888.

(c) And see the National Debt Act, 1889.

immense capital which would otherwise either lie unproductive, or be laid out in securities of a troublesome and hazardous nature. It conduces also, in a very sensible degree, to the stability of the national institutions, and to the preservation of the public welfare ; so that, unless England should become an impoverished country, the arrangements made for the ultimate permanent reduction of the principal of the debt by means of a *sinking fund* (a), are not of much practical value. But, under the Sinking Fund Act, 1875, there are now two sinking funds ; known respectively as the Old Sinking Fund and the New Sinking Fund. The former consists of the surplus income of each financial year ; which must be applied in the succeeding year for the reduction of the Debt (b). The New Sinking Fund consists of the excess of the amount fixed for the time being as the permanent annual charge for the Debt, over the amount payable in respect of such charge (c). The New Sinking Fund has been suspended on several occasions, *e.g.*, in 1886, in 1897, in 1900 and 1901, and 1910 (d). The amount paid during the financial year 1912-13 as the fixed annual charge on the National Debt was 24,500,000*l.* This included a sum of about 4,600,000*l.* in respect of the ‘sinking funds.’

[The respective produces of the several taxes before mentioned were originally distinct funds ; being securities for the sums advanced thereon, and for them only. But these distinct funds were subsequently more or less aggregated ; and as the result of such

(a) A sinking fund was first established in 1716 by the Act of 3 Geo. 1, c. 7 ; and one was again set up by Pitt, in 1786.

(b) Sinking Fund Act, 1875, s. 5. (By the Finance Act, 1912, the amount was limited

to five million pounds.)

(c) *Ibid.* s. 3 ; Military Works Act, 1897, s. 3.

(d) National Debt Act, 1886 ; Finance Acts, 1900 and 1901 ; Treasury (Temporary Borrowing) Act, 1910.

[aggregation, there were formerly three capital funds in existence, namely, (1) the Aggregate Fund, (2) the General Fund, and (3) the South Sea Fund.] But in the year 1787 the public accounts were again newly arranged, by abolishing these divisions and including the whole in one, called the Consolidated Fund (*a*); which fund was still later combined with that of Ireland, and now forms with it the Consolidated Fund of the United Kingdom (*b*).

The net receipts of income paid into the Exchequer in the financial year ending 31st March, 1913, (after deducting repayments, &c.,) amounted to 188,853,232*l.* 18*s.* 10*d.* (*c*); and that income, under the name of the Consolidated Fund, is pledged for the payment of the whole of the National Debt of Great Britain and Ireland (*d*), including the amount annually set apart as 'sinking funds.' In addition, the Consolidated Fund is liable to several other specific charges imposed upon it at various periods by Act of Parliament; such as the Civil List and the salaries of ambassadors, the salaries and pensions of the judges (including county court judges (*e*)), and the salaries of certain other official persons (*f*). After payment of all which, the surplus is to be indiscriminately applied to the service of

(*a*) 27 Geo. 3, c. 13, s. 47.

(*b*) See Consolidated Fund Act, 1816; Revenue (Transfer of Charges) Act, 1856.

(*c*) This amount does not include a sum of about 95,000*l.* due to the Isle of Man for customs duties. (*Finance Accounts of U.K. for 1912-13*, p. 19.)

(*d*) Consolidated Fund Act, 1816.

(*e*) County Courts Act,

1888, ss. 23, 24.

(*f*) The charges permanently fixed upon the national revenue are known, technically, as 'consolidated fund 'services'; those which require an annual vote of Parliament are called 'supply 'services.' The proportion of these two classes of services to one another is about 1 to 4.

the United Kingdom, under the direction of Parliament (a).

The Civil List above mentioned is an annual sum granted by Parliament at the commencement of each reign, for the expense of the royal household and establishment, as distinguished from the general exigencies of the state; and is the provision before stated (b) to be made for the Crown out of the taxes, in lieu of the Crown's proper patrimony, and in consideration of the assignment of that patrimony to the public use. It must be pointed out that, though there has been a Civil List so called since the Revolution, the King was originally required to provide out of the income so assigned to him practically all the expenses of the civil government; it is only since the reign of William the Fourth that the Civil List has been freed from all public charges, and come to mean the income granted for the personal expenses of the monarch. The amount fixed for the Civil List has been subject in different reigns to considerable variation. At the commencement of the present reign, a Civil List was granted to, and settled on, His Majesty, during his reign, and for six months afterwards, to the amount of 470,000*l.* per annum, payable out of the Consolidated Fund, at such times, and in such manner, as the Treasury may direct; of which sum, 110,000*l.* is assigned for Their Majesties' privy purse, and the remainder is applicable chiefly to the salaries and expenses connected with their household, but the 'Civil List pensions' are no longer chargeable on the Civil List. In return for that grant, it was at the same time provided that the hereditary revenues of the Crown should, during the present reign, be carried to, and form part of, the Consolidated Fund (c). The

(a) Public Revenue and Consolidated Fund Charges Act, 1854.

(b) See *ante*, p. 657.  
(c) Civil List Act, 1910, ss. 1, 8, 9. (The same Act



Civil List, therefore, now stands in the same place as the hereditary income did formerly ; but with this great difference, namely, that it is not chargeable, as the hereditary income was, with the general and public expenses of the Government.

Upon the whole, it is doubtless much better for the Crown, and also for the people, to have the revenue settled on the modern rather than on the antient footing. For the Crown, because it is more certain, and collected with greater ease ; and for the people, because they are now delivered from the feudal hardships, and other odious branches of the prerogative.

contains provisions for payments to Her Majesty the Queen and other members of	the Royal Family, in certain contingencies.)
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## CHAPTER VIII.

## OF THE ROYAL FORCES.

WE now come to consider the royal forces, and the manner in which these forces are raised and maintained.

[In the time of our Saxon ancestors, as appears from Edward the Confessor's laws (a), the military force of this kingdom was in the hands of the dukes, or heretochs, who were constituted through every province or county in the kingdom ; and as they were invested with unlimited power, therefore they were elected by the people in their full assembly, or folk-mote, in accordance with the fundamental maxim of the Saxon constitution, that where any officer was entrusted with unlimited power, that power should be delegated to him by the vote of the people themselves (b).

It seems to be universally agreed, that King Alfred first settled a national militia in this kingdom. But he possibly left too large a power in the hands of the dukes or heretochs ; whereby he enabled Duke Harold, on the death of Edward the Confessor, to mount the throne of this kingdom, in prejudice of Edgar Atheling, the rightful heir. At the Norman Conquest, when the

(a) Schmid, *Gesetze der Angelsachsen*, c. 32 a. [The meaning of the passage is very doubtful ; and, in any case, it is poor evidence of Anglo-Saxon usage.—E. J.]

(b) *Isti vero veri eligebantur per commune consilium, pro*

*communi utilitate regni, per provincias et patrias universas, et per singulos comitatus, in pleno folkmote, sicut et vicecomites provinciarum et comitatum, eligi debent.*—Ll. Edw. Confess. *ubi sup.* See also Bede, *Eccl. Hist.* l. 5, cap. x.

[feudal system was developed (which system was essentially military), all the land in the kingdom, held by tenure in chivalry, was divided into what were called knights' fees, of which the traditional number was sixty thousand, though modern investigation suggests five thousand as a more probable number (*a*). For every knight's fee, a knight or soldier (*miles*) was bound, as we have said, to attend the King in his wars for forty days in the year ; and by these means, the King had, without any expense, a fighting force always ready at his command. In course of time, however, as we have already seen, this personal service was gradually commuted for a money payment or scutage (*b*) ; and, before the end of the thirteenth century, the feudal levy had been, in practice, almost entirely superseded, as a professional force, by the system of *commissions of array*, whereby soldiers were levied to serve for pay (*c*).

In the meanwhile, the old Saxon *fyrð*, or national militia, had never entirely died out ; having been carefully fostered as a defensive force by the Norman and later kings. For example, the Assize of Arms (27 Hen. 2) of 1181, and afterwards the Statute of Winchester, under Edward the First (1285), obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace. By the latter statute, constables were appointed in all hundreds to see that such arms were provided ; and by the 4 & 5 Ph. & M. (1558) c. 2, these weapons were changed into others of more modern service. About the latter time, too, *lieutenants* of counties were appointed, as standing representatives of the Crown, in military matters, in

(*a*) Maitland, *Domesday Book*, p. 511.

(*b*) See *ante*, p. 660.

(*c*) For a summary of the

early law on the subject, see *Manual of Military Law*, ch. ix. pars. 3-22.

[substitution for the sheriffs (*a*); Camden describing them (*b*), in the time of Queen Elizabeth, as extraordinary magistrates constituted in times of difficulty and danger. These commissions of lieutenancy gradually superseded the old commissions of array; and King Charles the First having, during his northern expedition, issued these commissions of lieutenancy, it was made a question with the Long Parliament, how far the power of the militia did inherently reside in the King. Eventually, the Parliament denied this prerogative of the Crown; and also seized into their own hands the entire power of the militia.

At the restoration of King Charles the Second, however, when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognise the sole right of the Crown to govern and command them, and to put the whole upon a more regular military footing;] and the legal position of the militia, till it virtually ceased to exist owing to the introduction of the new scheme shortly to be explained, was principally built upon the statutes which were then enacted—viz., the 13 Car. 2 st. 1 (1661) c. 6, which declared that the supreme command of all the militia of the realm is, and ever was, the undoubted right of the King (*c*), the 14 Car. 2 (1662) c. 3, and the 15 Car. 2 (1663) c. 4. It is true that these statutes have been in part repealed (*d*); but by the subsequent Militia Acts, many of their provisions were re-enacted, with the addition of new regulations. The system, which (as we have said) has recently ceased to exist, was chiefly governed by the provisions of the general Militia Act, 1802, and the Militia Act, 1882; which latter statute repealed and re-enacted, with

(*a*) 15 Rym. 75. See 3 & 4 Edw. 6 (1549) c. 5, s. 13; and 4 & 5 Ph. & M. (1558) c. 3.  
(*b*) *Brit.* (ed. 1594) 103.

(*c*) See the Regulation of the Forces Act, 1871, pt. ii.  
(*d*) Statute Law Revision Act, 1863.

amendments, the Militia (Voluntary Enlistment) Act, 1875, and was itself amended by the Reserve Forces and Militia Act, 1898, and the Militia and Yeomanry Acts, 1901 and 1902.

<sup>a</sup> The scheme of that system was to train, at stated periods of the year, for the internal defence of the country, a certain number of the inhabitants of every county, who were enlisted for a period not exceeding six years, and officered by gentlemen commissioned by the Crown for that purpose. Although thus periodically called together for the purpose of being trained, the militia, save so far as was otherwise provided by the Reserve Forces and Militia Act, 1898, could only be *embodied* in case of imminent national danger or great emergency; the occasion being first communicated to Parliament, if sitting, or if not sitting, declared by Order in Council and notified by proclamation (a). This militia, in whatever county raised, were liable to serve in any part of the United Kingdom; but not abroad, except in the case of men who specially volunteered for the purpose. During nearly the last hundred years of its existence, the militia was raised by voluntary enlistment; and the compulsory levy by way of ballot remained suspended, at first under annual Acts, and afterwards under the Militia (Ballot Suspension) Act, 1865 (b). The men were entitled to pay, while on service and during the period of training.

What has been said above relates to the force known as the 'general' (or 'regular') militia; but there are still on the statute book statutes (c) which provide for the raising of what is known as the 'local' militia—

(a) Militia Act, 1882, s. 18. 1902.

See further as to the militia, the Reserve Forces and Militia Act, 1898, and Militia and Yeomanry Acts, 1901 and

(b) Expiring Laws Continuance Act, 1907.

(c) The Militia Acts, 1812 and 1813.

a force raised by ballot in each county, and not liable to serve outside the county where raised. No further account of this force need be given here ; it has not been raised since 1815.

Besides the militia, we are to take into account our *yeomanry* and *volunteer* forces. The yeomanry, as originally constituted in 1804 (*a*), were in fact a body of unpaid volunteer cavalry ; but their constitution was radically altered by Acts passed at the beginning of the present century (*b*), the effect of which was to assimilate the position of the yeomanry to that of the general militia, subject to certain small differences (*c*).

As regards the volunteers, these, in the form in which they existed up till very recently, originated in the fears of a French invasion in 1859 ; the volunteer force which was called into existence by the Napoleonic wars (*d*), having been disbanded in 1815. By means of such volunteers, the defensive military forces of the country were greatly increased ; and the necessity for maintaining a voluntary army appears to be now universally acknowledged, in consequence of the very large and constant additions made to the armaments of the Continental Powers (*e*).

Although, however, the above account of the militia, yeomanry, and volunteers, is of much historical interest, an entire reorganisation of the auxiliary forces

(*a*) The Yeomanry Act, 1804.

(*b*) The Militia and Yeomanry Acts, 1901 and 1902.

(*c*) See generally as to the yeomanry, and the points of difference between the yeomanry and the militia, *Manual of Military Law*, ch. xi. pars. 58–60.

(*d*) Yeomanry Act, 1804 ;

since repealed, so far as relates to volunteer infantry in England, by the Volunteer Act, 1863.

(*e*) By the Volunteer Act, 1863, previous Acts relating to the volunteer force in Great Britain were consolidated. See, for amending Acts, the Volunteer Acts, 1869, 1881, 1895, 1897, and 1900.

has now been carried out under the provisions of the Territorial and Reserve Forces Act, 1907.

Under this Act, the former volunteers (a) and yeomanry of Great Britain have been transformed into a new force, called the 'Territorial Force,' which in character more closely resembles the former militia than the former volunteers. The men of the Territorial Force are enlisted for some county, and for some period not exceeding four years; they are liable to serve anywhere in the United Kingdom, but not, unless they have specially undertaken that liability, outside the United Kingdom. Every member of the force is required to undergo a specified amount of training in every year. The conditions under which the Territorial Force is liable to embodiment, differ somewhat from those formerly applying in the case of the Militia. The power to embody the new force will arise whenever a Proclamation has been issued ordering the Army Reserve to be called out; and, moreover, that power *must* be exercised when directions have been given for calling out the entire first class of the Army Reserve, unless Parliament presents an Address to the Crown, praying that directions shall not be given for embodying the Territorial Force.

All members of the Territorial Force are subject

(a) The title 'Volunteers' is one of the misleading titles of which the British public appears to be so fond. Our 'regular' army is a volunteer army; for conscription has never, in modern times at an rate, been practised in England. Even the old militia, though technically liable to be recruited by ballot, had, in fact, for the last hundred years of its existence, been of a voluntary character. The really important distinctions between the old 'volunteers' and the regular army were that the former (1) served without pay; (2) only devoted a small part of their time to military duties; (3) could not be compelled to serve outside the United Kingdom.

to military law during training and embodiment, as well as at certain other times (*a*).

The organisation and administration of the units of the Territorial Force in a county are (except during training, actual military service, or embodiment) controlled by a body known as the County Association, constituted partly of officers of the Territorial Force, partly of civilians.

Under this new system, as has been before remarked, the old militia has virtually disappeared; some of it having been actually disbanded, and the rest transferred to the Army Reserve, to form battalions of Special Reservists (*b*), while the militia officers have been given commissions in the Special Reserve of Officers (*c*). But the power to resort, in case of emergency, to the old militia ballot has not, it is believed, been abolished by the new arrangements.

[The occasions of war, however, require soldiers more completely and perfectly disciplined than those of the civilian forces; our military establishment consequently comprises, besides the Territorial Force, a large body of regular forces who are raised by voluntary enlistment. Our constitution indeed looks with jealousy upon levies of this description; and King Charles the Second having, after the Restoration, kept up by his own authority, for guards and garrisons, about five thousand regular troops, which King James the Second by degrees increased to no less than thirty thousand, all paid from his own Civil List, it was made one of the articles of the Bill of Rights, in 1689, “that the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against law.” But as the fashion of

(*a*) Army Act, s. 176 (6 A). note (*b*).)

(*b*) Order in Council of 9th April, 1908. (For the Army Reserve, see *post*, p. 690,

(*c*) For these officers, see Territorial and Reserve Forces Act, 1907.



[keeping standing armies, first introduced by Charles the Seventh of France, in the year 1445 (*a*), came afterwards to prevail universally over Europe, it has also for a long time been judged necessary by our legislature, for the safety of the kingdom, the defence of the realm, and the preservation of the balance of power in Europe, to maintain, even in time of peace, a standing body of troops, under the command of the Crown.] After 1689 it became, accordingly, the practice for an Act, known as the Mutiny Act, to be passed in every year, whether in peace or war, to authorise, but only from year to year, the maintenance of the regular forces deemed necessary for the service of the State, and to make temporary provisions as to their enlistment, discipline, and regulation (*b*).

In the year 1879, however, it was thought desirable to obviate the necessity for passing an elaborate annual statute for this purpose, by enacting a code on this subject, of a more permanent character, which was embodied in the Army Discipline and Regulation Act,

(*a*) Robertson, *Hist. of Charles V.* i. 24.

(*b*) The paid forces now authorised, amount to 185,600 men, exclusive of the reserves and the forces actually serving in India (Army (Annual) Act, 1913, preamble). By the Reserve Forces Act, 1882, as amended by the Reserve Forces Acts, 1890, 1900, and 1906, the Reserve Forces and Militia Act, 1898, and the Territorial and Reserve Forces Act, 1907, provision is made for establishing a reserve force to be called the 'Army Reserve,' consisting of men who are either transferred to

the Reserve on the completion of their term of service with the colours in the regular army, or are enlisted direct into the Reserve under the last-mentioned Act. Men enlisted direct into the Reserve are termed 'special reservists,' and are liable to undergo, in addition to their annual training, special training for a period not exceeding six months. The 'Militia Reserve' which can be raised under the Reserve Forces Act, 1882, is practically extinct; enlistment for it having ceased in 1901.

1879, amended by the Regulation of the Forces Act, 1881, and repealed and re-enacted with amendments by the Army Act (*a*). This last-mentioned Act is directed to come into force by, and during the continuance of, an annual Act, to be passed for that purpose, but for no longer period ; and to be subject to such provisions as may be specified or referred to in the annual Act. Accordingly, a short annual Army Act has been passed in each year from 1882 to the present time, specifying the number of soldiers which the Crown may lawfully keep on foot during the current year (*b*). The Army Act has also, from time to time, been considerably amended by the successive (annual) Army Acts.

In this military code, provision is made for the manner in which the troops are to be enlisted and ‘billeted,’ that is, dispersed among the several innkeepers and victuallers throughout the kingdom (*c*) ; and regulations are laid down for the government of the army, and for every person subject to military law. The Army Act also empowers the Crown to make Articles of War and Rules of Procedure for the regulation of courts-martial and other matters which are to be judicially noticed ; and to erect, or grant authority to convene, courts-martial, with jurisdiction to try and punish offences according to any such Articles of War,

(*a*) This statute enjoys the curious distinction of having no fixed date ; being, in accordance with the admirable requirements of the Army (Annual) Act, 1884, re-issued in amended form whenever alterations are made in it. The last re-issue was in 1911.

(*b*) The authority is now of the most indirect character, consisting merely of a recital,

in the preamble of the annual Army Act, of the number of men adjudged to be necessary, followed by a formal prolongation of the permanent Army Act for a limited period in the enacting part.

(*c*) As to the period of enlistment (which cannot be for a longer period than twelve years), see Army Act, ss. 76–78.

and the provisions of the Act (a). But in order to limit, as far as possible, the power thus conceded to the Crown, the Army Act provides that nothing therein contained shall exempt any officer or soldier from being proceeded against by the ordinary course of the law (b); and where an officer or soldier is accused of any offence against a subject of the realm, punishable by the civil courts, he is to be delivered over to the civil magistrates. Further, in the case of certain grave offences, a court-martial has no jurisdiction to try the offender if the offence was committed in the United Kingdom (c). Moreover, no person may, by any such Articles of War, be subjected to suffer any punishment extending to life or limb, or be kept in penal servitude, for any crime which is not expressed to be so punishable in the Army Act itself; nor be punished in any manner which shall not accord with the provisions of that Act. The Act itself accordingly fixes the punishments to be inflicted, and makes provision as to certain specific offences; some of which, such as cowardice, mutiny, and wilful disobedience, whenever committed, render the offender liable to suffer death, while others are only punishable with death if committed on active service (d). Hitherto, the express provisions of the Act have been found sufficient for all purposes; and it has not been found necessary to make Articles of War.

The system of military law thus devised for the army is, partly by the Army Act itself, and partly by other statutes, made applicable to a limited extent to the Territorial Force also, when this is called out for service, and at certain other times; or even at all times in certain cases (e). And no relief can be afforded by

(a) Army Act, ss. 69, 70;  
*Home v. Lord Bentinck* (1820)  
 2 Brod. & B. 130; *In re Mansergh* (1861) 1 B. & S. 400.  
 See generally, *Manual of Military Law*.

(b) Army Act, s. 162.  
 (c) *Ibid.* ss. 39, 41 (a), (b), 162.  
 (d) Ss. 4, 5, 41, 44.  
 (e) Army Act, ss. 175–184; Militia and Yeomanry Act,

the ordinary courts of law from the sentences, however erroneous, of courts-martial, so long as they exceed not their jurisdiction ; but the finding of a court-martial (not being an acquittal) is not valid unless confirmed in manner provided by the Act, which also contains provisions for allowing the sentences of courts-martial to be commuted or remitted (a).

The establishment of such a system in this country doubtless involves, notwithstanding the care with which its provisions are guarded, a partial departure from the principles of our free constitution ; and this is recognised in the Army Act itself. For it is set forth in the preamble of each annual Army Act, that “ no man can be forejudged of life or limb, or subjected “ in time of peace to any kind of punishment within “ this realm, by martial law, or in any other manner “ than by judgment of his peers, and according to the “ known and established laws of this realm ” (b)—a doctrine entirely conformable to, and apparently founded on, the Petition of Right, which enacts, that *no* commission shall issue to proceed according to martial law (c). But the policy of the Army Acts may be easily defended, in that it is impossible by any other means to maintain the proper severity of military discipline ; and their legality is put beyond all question by the omnipotence of Parliament—the authority of Parliament being sufficient even to supersede altogether the established course of justice, and to

1901 ; Reserve Forces Act, 1882, ss. 6, 14 ; Militia Act, 1882, ss. 23–27 ; Territorial and Reserve Forces Act, 1907, s. 28.

(a) *Grant v. Gould* (1792) 2 H. Bl. 100, 101 ; *Marks v. Frogley* [1898] 1 Q. B. 888 ; and see the Army Act, ss. 54, 57.

(b) Army (Annual) Act,

1913, preamble.

(c) 3 Car. 1 (1627) c. 1 ; 31 Car. 2 (1679) c. 1 ; Hale, *Hist. C. L.* ch. ii. (The Petition of Right did not limit the prohibition of martial law to time of peace ; but the limitation appears to have crept in during the early years of the 18th century.)

proclaim martial law in its stead. Thus, by the statute passed in Ireland, in 1798, for the suppression of the rebellion there, it was provided, that the Lord Lieutenant might, during the rebellion, whether the courts of justice were open or not, issue his orders to the officers of the forces and others, to take the most vigorous measures for suppressing it, and to punish all rebels by death or otherwise, as to them should seem expedient, and to cause all persons arrested as rebels to be tried in a summary manner by courts-martial. Upon the same principle, the Habeas Corpus Act may, upon emergency, be suspended, as has been more than once done; but save by means of such special Act authorising it, martial law cannot be proclaimed in this country (a).

On the other hand, careful provision has been made by law for the benefit of soldiers, including the allowance of pensions to those who are sick, hurt, and maimed (b), and the establishment of the royal hospital at Chelsea for such as are worn out in their duty (c); and army chaplains (d), and army schools (e), are provided for their religious and general welfare. Moreover, soldiers, if on actual service, may make 'nuncupative' (or oral) wills, and dispose of their goods, wages, and other personal chattels, without those solemnities

(a) 4 Inst. 123; 2 Hawk. 5, 9. On the much discussed question of what martial law really means, see *Law Quarterly Review*, vol. xviii. pp. 133–158, and *Manual of Military Law*, ch. i. par. 17.

(b) See Patriotic Fund Reorganization Act, 1903, as to the Patriotic Fund; and Pensions Act, 1839, and Pensions and Yeomanry Pay Act, 1884, as to pensions, &c.

(c) Chelsea and Kilmain-

ham Hospitals Act, 1826; Army Pensions Act, 1830; Army (Artillery, &c.) Pensions Act, 1833; Drouly Fund Act, 1838; 6 & 7 Vict. (1843) c. 31; Chelsea Pensions (Abolition of Poundage) Act, 1847; Chelsea Hospital Act, 1876; and Royal Military Asylum, Chelsea (Transfer) Act, 1884.

(d) Army Chaplains Act, 1868.

(e) Army Schools Act, 1891.

which the law requires in other cases (*a*) ; and, on their death, soldiers' effects are collected, and, subject to the payment of their regimental debts, the balance is remitted to the persons entitled thereto (*b*).

[The Royal Navy of England hath ever been its greatest defence and ornament ; it hath been assiduously cultivated, even from the earliest ages ; and yet, so vastly inferior in point of naval power were our ancestors to the present age, that even in the maritime reign of Queen Elizabeth, Sir Edward Coke thinks it matter of boast, that the royal navy of England then consisted of *three and thirty* ships (*c*).

Many laws have been made for the supply of the royal navy with seamen ; for their regulation when on board ; and to confer privileges and rewards on them during and after service.

1. With regard to the supply of seamen. The power of *impressing* seafaring men for the sea service by the royal commission was always submitted to with great reluctance ; but the practice of impressing is of very antient date, and hath been uniformly continued by a regular series of precedents to a comparatively recent time. It is, in fact, part of the common law (*d*), some few people (such as ferrymen) being, however, privileged ; and it hath been recognised by the courts (*e*), and also by divers Acts of Parliament. Thus, the 2 Ric. 2, st. 1 (1378) c. 4, speaks of mariners being arrested and retained for the King's service, as of a thing well known and practised without dispute ; and provides a remedy against their

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|---------------------------------------|-----------------------------------|
| (a) Wills Act, 1837, s. 11 ;          | made under that Act.              |
| <i>In the Goods of Spratt</i> [1897]  | (c) 4 Inst. 50.                   |
| P. 28 ; <i>Gattward v. Knee</i>       | (d) <i>R. v. Broadfoot</i> (1743) |
| [1902] P. 99 ; <i>In the Goods of</i> | Foster, 154.                      |
| <i>Scott</i> [1903] P. 243.           | (e) <i>R. v. Tubbs</i> (1776) 2   |
| (b) Regimental Debts Act,             | Cowp. 512.                        |
| 1893, and the Regulations             |                                   |

[running away. By the 2 & 3 Ph. & M. (1555) c. 16 (which, however, was repealed by the 7 & 8 Geo. 4 (1827) c. lxxv. s. 1), if any waterman, using the river Thames, hid himself during the execution of any commission of pressing for the King's service, he was made liable to heavy penalties. By the 5 Eliz. (1562) c. 5 (since repealed by the Sea Fisheries Act, 1868), no fisherman was to be taken by royal commission to serve as a mariner; but the commission was first to be brought to two justices of the peace, inhabiting near the sea coast where the mariners were to be taken, to the intent that the justices might choose out and return such a number of able-bodied men, as in the commission was contained, to serve Her Majesty. And, by several other Acts, especial protections were allowed to seamen in particular circumstances, to exempt them from being impressed (*a*).]

But, besides this method of impressing, the royal navy is also largely, and in ordinary times exclusively, supplied by voluntary enlistment (*b*). Great advantages in point of wages are given to volunteer seamen; also, where they are already engaged in the merchant service, they are enabled to leave it, without punishment or forfeiture, in order to engage in His Majesty's navy (*c*).

2. The method of ordering seamen in the royal fleet is closely analogous to that established for the government of the army, namely, by Articles of the Navy, corresponding to the Articles of War. The first Articles of War for the navy were drawn up in 1661 (*d*); but the scheme of naval discipline contained in these rules

(*a*) See especially, Exemption from Impressment Act, 1739, still in force.

(*b*) Naval Enlistment Acts, 1835, 1853, and 1884.

(*c*) Merchant Shipping Act,

1894, ss. 195–197, continuing the like provisions contained in several earlier Acts of the reign.

(*d*) 13 Car. 2, st. 1, c. 9.

was modified by the 22 Geo. 2 (1749) c. 33, and the present scheme is to be found in the Naval Discipline Act of 1866, as amended by the Naval Discipline Act, 1884. The Indian Marine Service is subject to the rules of discipline contained in the Indian Marine Service Act, 1884. All these Acts are permanent in their character, and do not require, as in the case of the army, to be brought into force for a specified time by an annual Act passed for that purpose ; because there is nothing in our law which makes the maintenance of the royal navy, even without the approval of Parliament, unlawful. By these Acts for the government of the navy, a great variety of offences are defined or specified ; some of which have reference to a state of war (*a*), while others are of a nature to which the ordinary law applies ; and the appropriate punishment for each offence is also mentioned or specified. By a recent statute (*b*), a very desirable reform in this direction has been made by the substitution of detention for imprisonment in case of minor breaches of discipline ; and, by a still more recent Act (*c*), one of the important questions raised by the happy participation of the self-governing colonies in the naval defence of the Empire has been dealt with. The Acts also provide, that any offence triable under the Acts may be tried and punished by court-martial (*d*) ; and any offence triable under the Acts not committed

(*a*) These are chiefly, misconduct in the presence of the enemy, communications with the enemy, neglect of duty, mutiny, insubordination, and desertion ; and some of these are capital. But, except in the case of mutiny, the punishment of death, when awarded by the sentence of a court-martial, is not to be inflicted till the sentence has been

confirmed by the Admiralty, or by the commander-in-chief on a foreign station. (See Naval Discipline Act, 1866, s. 53.)

(*b*) Naval Discipline Act, 1909.

(*c*) Naval Discipline (Dominion Naval Forces) Act, 1911.

(*d*) Naval Discipline Act, 1866, s. 56.



by an officer, and not thereby made capital, may, under such regulations as the Admiralty may from time to time issue, be summarily tried and punished by the officer in command of the ship to which the offender belongs, subject, however, to certain restrictions. But nothing in the Acts is to supersede the authority of the Courts of ordinary jurisdiction in His Majesty's dominions (*a*).

3. With regard to the privileges conferred on sailors, these are pretty much the same with those conferred on soldiers. Careful provision has been made for their relief when maimed, wounded or superannuated (*b*); and they have also the power of making nuncupative wills of personalty (*c*).

Besides seamen ordinarily so called, we may remark here, that in His Majesty's fleet and naval service are to be found the forces commonly termed the 'Royal Marines.' The discipline and regulation of these also when quartered, as they often are, on shore, or sent to do duty on board of transports or merchant ships, or in other circumstances in which they are not subject to the Naval Discipline Act, is provided for by the Army Act; the provisions of which, with certain modifications, include the Royal Marine forces (*d*).

(*a*) Naval Discipline Act, 1866, s. 101.

(*b*) Greenwich Hospital Act, 1845; 12 & 13 Vict. (1849) c. 28; 13 & 14 Vict. (1850) c. 24; Greenwich Hospital Acts, 1865 to 1898; and see, as to the Patriotic Fund, p. 694, note (*b*), *ante*.

(*c*) Wills Act, 1837, s. 11; Navy and Marines (Wills) Acts, 1865 and 1897.

(*d*) See Army Act, ss. 179 and 190 (8) (15) (A) (ii.). By the Royal Naval Reserve (Volunteer) Acts, 1859 and

1896, and the Naval Reserve (Mobilization) Act, 1900, provision is made for the establishment of a *reserve force* of seamen volunteers. (And see further the Naval Reserve Act, 1900; Royal Naval Reserve Act, 1902; and the Naval Forces Act, 1903.) By the Merchant Shipping (Mercantile Marine Fund) Act, 1898, s. 6, provision has been made for securing a supply of boy seamen for the Naval Reserve.

## CHAPTER IX.

## OF THE NOBILITY AND OTHER RANKS.

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[THE civil state consists of the nobility and the commonalty. Of the nobility, or lords temporal, as forming, together with the bishops, one of the branches of the legislature, we have already spoken (*a*) ; we are here to consider the nobility and the commonalty according to their several degrees of honour and worship. And first, of the NOBILITY.

All degrees of nobility and honour are derived from the Crown as their fountain ; and the King may institute what new titles he pleases. Hence it is all that degrees of honour are not of equal antiquity. Those now in use are dukes, marquesses, earls, viscounts, and barons.

1. A *duke*, though in respect of his title of nobility inferior in point of antiquity to many others, is yet superior to all of them in rank ; for his is the first title of dignity after the royal family. Among the Saxons, the *duces* signified, as among the Romans, the commanders or leaders of the armies ; and in the laws of Henry the First, as translated by Lambard, these *duces* are called *heretochii*. But after the Norman conquest our Kings did not honour any of their subjects with this title, till the time of Edward the Third, who, in the eleventh year of his reign, created his son, Edward the Black Prince, ‘ Duke of Cornwall.’

(*a*) See *ante*, bk. iv. pt. i. ch. i.

[In the reign of Queen Elizabeth, A.D. 1572, the whole order became utterly extinct ; but it was revived, about fifty years afterwards, by her successor, in the person of George Villiers, Duke of Buckingham (a).

2. A *marquess*, *marchio*, is the next degree of nobility. His office was, formerly, to guard the frontiers and limits (*marches*) of the kingdom ; in particular, the marches of Wales and Scotland, while they continued to be enemies' countries. The persons who had command there were called lords marchers, or marquesses. Their authority in Wales was abolished by the 26 Hen. 8 (1534) c. 6 ; but the title had, long before, become a mere title of nobility—Robert Vere, Earl of Oxford, being created Marquess of Dublin, by Richard the Second, in the eighth year of his reign (1384) (b).

3. An *earl* is a title of nobility so antient that its original cannot clearly be traced out. But this much seems tolerably certain, namely, that among the Saxons there were *ealdormen*, i.e., 'elder men,' signifying the same as *senior* or *senator* among the Romans, and synonymous, or nearly so, with *eorls* (c) ; and these were called also *schiremen*, because they had each of them the civil government of a shire. In Latin, earls were called *comites*, from being the King's attendants (d) ; and after the Norman Conquest, they were for some time called *counts* or *countees*, and their shires were called 'counties.' The name of *earl* is, however, now also become a mere title of nobility ; an earl not having had (as such) since the Conquest anything to do with either

(a) Camden, *Britann. tit. Ordines* ; Spelman, *Gloss.* 191.

(b) 2 Inst. 5.

(c) But the word *earl* is not the same as *eorl*, being probably derived from the Danish

*jarl*. (See, however, Pollock and Maitland, *Hist. of Eng. Law*, i. 32.)

(d) Bracton, l. 1. cap. viii. ; Flet. l. 1. cap. v.

[the civil or the military government of the county. In writs and commissions, and other formal instruments, the King, when he mentions any peer of the degree of an earl, usually styles him “ trusty and well “ beloved *cousin* ” ; an appellation which is as antient as the reign of Henry the Fourth, who, being either by his wife, his mother, or his sisters, actually related or allied to every earl in the kingdom, artfully and constantly acknowledged that connexion in all his letters and other public acts. From whence the usage has descended to his successors ; though the reason has long ago failed.

4. The sheriff of the county was sometimes called *vicecomes* ; which name was afterwards made use of as an arbitrary title of honour, without any shadow of office pertaining to it. Henry the Sixth, in the eighteenth year of his reign (1439), created John Beaumont a peer by the name of *Viscount* Beaumont, which was the first instance of the kind (*a*).

5. A *baron* is the most general title of nobility ; and formerly every one of the peers of superior rank had also a barony annexed to his higher title (*b*). But it hath sometimes happened, that when a peer with a barony annexed to his title hath been raised to a new degree of peerage, the two titles have, in the course of a few generations, descended differently ; one perhaps to the male descendants, and the other to the heirs general, whereby the earldom or other superior title hath subsisted without the barony. And there are also modern instances where earls and viscounts have been created without annexing a barony to their other honours ; so that now the rule doth not hold universally that all peers are barons.

(*a*) 2 Inst. 5.

(*b*) *Ibid.*

[The original and antiquity of baronies have occasioned great inquiries among our English antiquaries ; and the opinion, which seems the most probable one, is that the barons were the same as the lords of manors, or the tenants *in capite* of the Crown (a). For it may be collected from King John's Magna Carta, that originally all lords or owners of estates holding under that tenure were called barons, and had seats in the Great Council or Parliament ; till the conflux of them became so large and troublesome, that the King was obliged to divide them, and to summon only the principal tenants, called the greater barons, in person, leaving the smaller ones to be summoned by the sheriff, to sit by representation in another House, which gave rise to the separation of the two Houses of Parliament (b). By degrees, the title came to be confined to the greater barons, or Lords of Parliament, only ; and there were no other barons among the peerage, but such as were summoned by writ in respect of the tenure of their lands or baronies, till Richard the Second first made a barony a mere title of honour, by conferring it on divers persons by his letters patent (c).

Having made this short inquiry into the original of our several degrees of nobility, we shall next consider the manner in which a peerage may be created. The right of peerage seems to have been originally territorial ; that is to say, it was annexed to lands, honours, castles, manors, and the like, the proprietors and

(a) Spelm. *Gloss. Baronia*.

(b) Gilb. *Hist. of Exch.* ch. 3 ; Seld. *Tit. of Hon.* pt. ii. ch. v. xxi. See, however, Pollock & Maitland, *Hist. of Eng. Law*, i. 279–282. (The formidable objection to Blackstone's theory is : that the famous clause in Magna Carta (14) makes no provision, for

representation of the minor barons. If they attended, they were to attend in person. But, for all that, the scheme of the Charter had, doubtless, an influence on later arrangements.)

(c) Co. Litt. 9 b ; Seld. *Jan. Angl.* 2, § 66.

[possessors of which were, in right of those estates, allowed to be peers of the realm, and were summoned to Parliament to do suit and service to their sovereign. And, when the land was alienated, the dignity passed with it as appendant. Thus, in one view, the bishops still sit in the House of Lords in right of succession to certain antient baronies annexed, or supposed to be annexed, to their episcopal lands (*a*) ; and similarly, in the eleventh year of Henry the Sixth (1433), the possession of the castle of Arundel was adjudged to confer on its possessor an earldom by tenure (*b*). But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of being territorial became personal ; and a peerage may now be created without connecting it even nominally with any particular locality (*c*), though it has remained usual, in creating a man a peer, to name him baron, earl, or the like, of some specified place.

Peers are now created either by writ, or by patent ; for those who claim by prescription must suppose either a writ or a patent made to their ancestors, which by length of time has been lost. The creation by writ or by King's letter, is by summons to attend the House of Peers, by the style and title of that peerage which the King is pleased to confer ; and the creation

(*a*) See *ante*, pp. 473–474 ; Seld. *Table Talk*, tit. *Bishops in Parliament*.

(*b*) Seld. *Tit. of Hon.* pt. ii. ch. ix. v. ; Cruise, *Dig.* vol. iii. p. 185. The question as to whether a barony can be claimed by tenure, has since been closely examined in the *Case of the Berkeley Peerage* (1861) 8 H. L. C. 21 ; and it was in that case decided (26th February, 1861), that no legal

right to be summoned to or to sit in Parliament can exist, at the present day, in any tenant for life or devisee of hereditaments, as such. And it was observed, that no earldom by tenure now exists ; that of Arundel having (as such) been put an end to by the 3 Car. 1 (1627) c. iv.

(*c*) Cruise, *Dig.* vol. iii. p. 219.

[by patent is by royal grant of the degree of peerage. The creation by writ is the more antient way ; but a man is not ennobled thereby, unless he actually takes his seat in the House of Lords. And therefore the most usual, because the surest, way, is to grant the dignity by patent ; for then the grant enures according to the limitations thereof, though the grantee should never himself make use of it (a). But it is still usual to call up the eldest son of a peer to the House of Lords by writ only, in the name of his father's barony ; because in that case there is no danger of his children losing the nobility. For if their father never takes his seat, they will succeed to their grandfather. Creation by writ has also one advantage over that by patent. For a peer created by writ holds the dignity to him *and his heirs* (b), without any words to that purport in the writ ; but in letters patent, there must be words to direct the inheritance, else the dignity enures to the grantee only for life (c). For a man or woman, may, by patent, be created noble for their own lives, and the dignity not descend to their heirs at all.]

It must, however, be noticed that, though the Crown may create a life dignity of this kind, that dignity will not of itself make the holder a lord of parliament ; this point having been clearly decided in 1856 in the *Wensleydale Peerage Case* (d), when the Committee of Privileges of the House of Lords declared that the letters patent granted to Mr. Baron Parke, creating him Lord Wensleydale for life, did not entitle him to sit and vote in Parliament (e). But now, under the Appellate Jurisdiction Acts, 1876 and 1887, every Lord of Appeal in Ordinary appointed to aid the House of

(a) Co. Litt. 16 b.

(b) Cruise, *Dig.* vol. iii. p. 223 ; *Devon Peerage Case* (1831) 5 Bligh (N.S.) 313 ; *Wiltes Claim of Peerage* (1869) L. R. 4 H. L. 126.

(c) Co. Litt. 9, 16.

(d) (1856) 5 H. L. C. 950.

(e) For the historical argument on this matter, see Anson, *Law and Custom*, i. ch. vi. § 4.

Lords in the hearing and determination of appeals, if he is not otherwise entitled to sit as a member of the House of Lords, becomes, by virtue of his appointment, entitled during his life to rank as a baron, and to sit and vote in the House of Lords. A peerage, however, is, except in the case last mentioned, always now conferred by letters patent in such a way as to give an hereditary dignity; sometimes to the heirs male of the body of the grantee (a), sometimes to the heirs female of his body, and sometimes to the heirs general of his body. It may even be made to descend to some particular heirs male; as where it is limited to a man, and the heirs male of his body by Elizabeth, his present lady, and not to such heirs by any former or future wife. It may also be limited to the grantee and his heirs collateral as well as lineal; and if a peerage be granted to a man 'and his heirs male,' it will descend, in default of heirs male of his body, to his heirs male collateral (b). Moreover, the right of primogeniture holds good among males in the descent of dignities; though it is otherwise as to females (c). For if a man holds a peerage to him and the heirs of his body, and dies, leaving only daughters, the dignity is in abeyance; and the King may in that case bestow it on which of them he pleases. Where there is no charter or instrument of creation in existence, and nothing to show how the dignity is to descend, the *prima facie* presumption of law is, that it is descendible to the heirs male (d).

[Let us next take a view of a few of the principal incidents of nobility, properly so regarded. First, we must observe that, when accused of treason or felony,

(a) Cru. Dig. vol. iii. pp. 218, 245; *Devon Peerage Case*, *ubi sup.*; *Wiltes Claim of Peerage*, *ubi sup.*

(b) *Devon Peerage Case*, *ubi sup.*

(c) Cru. Dig. vol. ii. p. 244.

(d) See *Mar Peerage*, *Kellie's Claim* (1876) L. R. 1 App. Ca. 1; and the 48 & 49 Vict. (1885) c. 48 ('An Act for the restitution of the antient dignity and title of Earl of Mar').



[a peer of the realm is tried by his peers. For the great are more or less obnoxious to the popular envy ; and, were they to be judged by the people, they would, moreover, be deprived of the privilege of being tried by their peers, which is secured to them by Magna Carta (a). But this right of trial by peers does not apply in the case of libel, perjury, conspiracy, and other misdemeanors ; for, in all these cases a peer is tried by an ordinary jury in the court where the indictment is found. It is said, also, that the privilege does not extend to bishops ; who, though they are lords of parliament, and sit there by virtue of their baronies, are yet not ennobled in blood, and consequently are not peers with the nobility (b). And it was so resolved by the House of Lords in 1692 ; but both the resolution and the doctrine of ennobled blood, on which it is supported, are apparently devoid of historical justification (c). As regards peeresses, moreover, the 20 Hen. 6 (1442) c. 9 has declared the law to be : that peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the realm (d). And if a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers ; but if she be only noble by marriage, then by a second marriage with a commoner, she loses her dignity. For as by marriage it is gained, by marriage it is also lost (e). Yet if a duchess dowager marries a baron, she continues a duchess still ; for all the nobility are *pares*, and therefore it is no

(a) Cap. 29 (ed. Stubbs). For the latest instance of a trial in the House of Lords, see the *Trial of Earl Russell* [1901] A. C. 446. (The Criminal Appeal Act, 1907, does not apply to trials in the House of Lords.)

(b) 3 Inst. 30, 31.

(c) See Stubbs, *Const. Hist.* iii. 443, n. 2.

(d) *Countess of Rutland's Case* (1605) Moore, 769 ; 2 Inst. 50 ; 6 Rep. 52 b ; Staundf. P. C. 215.

(e) *Haward v. Duke of Suffolk* (1558) Dyer, 79 ; Co. Litt. 16.

[degradation (a).] By courtesy, all dowager peeresses, though afterwards married to commoners, are ordinarily addressed by their former title ; and it seems that a peer, who has been divorced by his wife, cannot by any proceedings in the ordinary courts restrain her, upon her marriage with a commoner, from continuing to use her former title (b).

[Peers have certain other privileges with reference to judicial proceedings. For a peer, sitting in judgment on his peers, gives not his verdict upon oath, like an ordinary jurymen, but upon his honour (c) ; and he used to answer to proceedings in Chancery upon his honour, and not upon his oath (d). But, when he is examined as a witness, either in civil or criminal cases, he must be sworn (e) ; for the respect which the law shows to the honour of a peer does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis* (f). The honour of peers was, however, so highly esteemed by the law, that it was more penal to spread false reports regarding them and certain other great officers of the realm, than it was regarding other men ; such scandal being called *scandalum magnatum*, and, by divers antient statutes (g), subjecting the offender to peculiar punishments.] But it is to be noted that, as respects punishment for crimes committed by him, a peer, when once convicted, is on the same footing with other men.

The privileges of peerage, it is lastly to be observed, are not extended by the law to such persons as hold

(a) Co. Litt. 16 b ; 2 Inst. *ubi sup.*

(b) *Cowley v. Cowley* [1901] A. C. 450.

(c) 2 Inst. 49.

(d) *Meers v. Lord Stourton* (1711) 1 P. Wms. 146 ; Salk. 512.

(e) *Meers v. Lord Stourton*,

*ubi sup.*

(f) *Earl of Lincoln's Case* (1626) Cro. Car. 64.

(g) 3 Edw. 1 (1275) c. 34 ; 2 Ric. 2 (1378) st. 1, c. 5 ; 12 Ric. 2 (1388) c. 11 : all repealed by Statute Law Revision Act, 1887.

foreign titles of nobility ; who are in this country no more than commoners. But, since the Union with Scotland, all the peers of Scotland are peers of Great Britain, and, save a seat in the House of Lords, have all the attendant privileges ; and since the Union with Ireland all peers of Ireland, with the exception of such as are elected members of the House of Commons, have all the privileges of peerage, save only the right to a seat in the House of Lords.

Therefore the peerage, regarded as a dignity, presents the following varieties, that is to say :—(1) peerages which in their creation were peerages of England ; (2) peerages which in their creation were peerages of the United Kingdom of Great Britain ; (3) peerages which in their creation were peerages of the United Kingdom of Great Britain and Ireland ; (4) peerages which in their creation were peerages of Scotland ; and (5) peerages which in their creation were peerages of Ireland. The dates of the first class are antecedent to the Union with Scotland in 1707 ; of the second class, subsequent to that event, and antecedent to the Union with Ireland in 1801 ; of the third class, subsequent to the Union last mentioned ; of the fourth class, antecedent to the Act of Union with Scotland, which (by implication) forbade the creation of new Scottish peerages (*a*) ; and of the fifth class, either antecedent to the Union with Ireland or subsequent. For several Irish peerages have been created since that event ; under a power contained in the Act of Union with Ireland, which allows one Irish peerage to be created for every three which become extinct, till the number sinks to one hundred—below which the Irish peerage is not to be allowed to fall.

[A peer cannot lose his nobility but by death or attainder ; though there was an instance in the reign of Edward the Fourth of the degradation of George

(*a*) Act of Union with Scotland, 1706, Art. xxiii.

[Neville, Duke of Bedford, by Act of Parliament, on account of his poverty, which rendered him unable to support his dignity (*a*). That is, however, a singular instance ; which serves at the same time, by having happened once, to show the power of Parliament, and, by having happened but once, to show how tender the Parliament hath been in exerting so high a power. It was once asserted, indeed, that if a baron wasted his estate, so that he was not able to support his dignity, the King might degrade him (*b*) ; but the later authorities have held, that a peer cannot be degraded, save by Act of Parliament (*c*).] If, however, a peer become a bankrupt, he is, as we have seen (*d*), by the Bankruptcy Act, 1883, disqualified thereby from sitting and voting in the House of Lords until his bankruptcy is determined ; and, so long as he is disqualified, no writ of summons can be issued to him.

[The commonalty, like the nobility, are divided into several degrees. But as the nobility, though different in rank, are all of them peers in respect of their nobility ; so the commoners, though some are greatly superior to others, yet all are in law peers amongst themselves, in respect of their want of nobility (*e*).

The first name of dignity, next beneath a peer, was formerly that of *vidames*, *vice-domini*, or *valvasors* (*f*), who are mentioned by our antient lawyers (*g*) as *virī magnæ dignitatis* ; and Sir Edward Coke speaks highly of them. But they are now quite obsolete ; and our legal antiquaries are not even agreed upon their original or antient office (*h*).

(*a*) 4 Inst. 355.

(*b*) *Countess of Rutland's Case* (1606) Moore, 768.

(*c*) *Earl of Shrewsbury's Case* (1612) 12 Rep. 106 ; *Knowle's Case* (1694) 12 Mod. 56.

(*d*) See *ante*, pp. 484–485.

(*e*) 2 Inst. 29.

(*f*) Camden, *Britann. tit. Ordines*.

(*g*) Bracton, l. 1, cap. viii.

(*h*) See Pollock and Maitland, *Hist. of Eng. Law*, vol. i. p. 545, and Maitland, *Domesday Book*, p. 81.

[At the present time, therefore, the first dignity after the nobility, is a Knight of the Order of St. George, or of the Garter ; first instituted, in the opinion of Selden, by Edward the Third, in the eighteenth year of his reign (*a*). Next follows, but not till after certain official dignities, including, among others, Privy Councilors, and the Judges, a knight banneret (*b*), who, indeed, by the 5 Ric. 2 st. 2 (1382) c. 4, and 14 Ric. 2 (1390) c. 11, is ranked next after barons ; and his precedence before the younger sons of viscounts was confirmed to him by order of King James the First, in the tenth year of his reign (*c*). But, in order to entitle himself to this rank, he must have been created by the King in person, in the field, under the royal banners, in time of open war (*d*). Else he ranks after baronets, who are the next order. The title of baronet is a dignity of inheritance, created by letters patent, and usually descendible to the issue male (*e*). It was first instituted by King James the First, in the year 1611, in order to raise a competent sum for the reduction of the province of Ulster in Ireland ; and for this reason all baronets have the arms of Ulster superadded to their family coats (*f*). Next follow Knights of the Bath, an Order instituted by King Henry the Fourth, revived by King George the First, and newly regulated in the reign of Queen Victoria (*g*) ; they are so called from the ceremony, formerly observed, of bathing on the night before creation. The Order consists of civil knights and military knights. After them come the knights bachelors (*h*), the most antient, though the lowest, Order of

(*a*) Seld. *Tit. of Hon.* pt. ii. ch. 5, xl., citing Froissart, vol. i. ch. 101.

(*b*) See the Table of Precedence, *post*, p. 712.

(*c*) Seld. *Tit. of Hon.* pt. ii. ch. 11, iii.

(*d*) 4 Inst. 6.

(*e*) *Re Rivett-Carnac's Will* (1885) 30 Ch. D. 136.

(*f*) The arms of Ulster are, a hand *gules*, or a bloody hand, in a field *argent*.

(*g*) See *London Gazette*, 25 May, 1847 ; 16 Aug. 1850.

(*h*) The most probable deri-

[kighthood amongst us ; for we have an instance of King Alfred's conferring this order on his son Athelstan. Knights are called in Latin *equites aurati* ; *aurati* from the gilt spurs they wore, and *equites*, because they always served on horseback (*a*). They are also called *milites*, because they formed a part of the royal army, in virtue of their feudal tenures ; one condition of which was, that every one who held a knight's fee immediately under the Crown, was obliged to be knighted, and to attend the King in his wars, or else to pay a fine for his non-compliance (*b*).

These, Sir Edward Coke says, are all the names of *dignity* in this kingdom ; esquires and gentlemen being only names of *worship* (*c*). But before these last, the heralds rank all colonels, serjeants at law, and doctors in the three learned professions (*d*). And, by an order

vation of the word bachelor is from *bas* and *chevalier*, an inferior knight ; and thence latinised into the barbarous word *baccalaureus* (Ducange, *Bac.*).

(*a*) *Camd. Brit. tit. Ordines* ; *Co. Litt.* 74.

(*b*) 2 *Inst.* 594.

(*c*) *Ibid.* 667. The various orders or decorations granted by the King as Emperor of India appear to be also mere names of *worship*.

(*d*) The Table of Precedence as given by Blackstone in the edition of 1778 (vol. i. p. 405) is here subjoined, with slight modifications. But its authority in some points at the present day can scarcely be relied upon, except with regard to those which are marked \*, who are entitled to the rank there allotted them,

by the 31 Hen. 8 (1539), c. 10 ; those marked †, who are entitled by the 1 W. & M. (1688) c. 21, and those marked ||, who are entitled by letters patent, 9, 10, and 14 Jac. 1. As to those marked ‡, their place depends on antient usage and custom ; and as to them the following authorities may be consulted :—*Seld. Tit. of Hon.* ; *Camden, Britannia*, tit. *Ordines* ; *Milles, Catalogue of Honour* (edn. 1610) ; and *Chamberlayne, Present State of England*. It is to be observed, moreover, that the Judicature Acts, 1873 to 1884, contain provisions with regard to the rank and precedence among themselves of the judges of the Court of Appeal and of the High Court of Justice, and of certain officers therein. (See the Supreme

[of Queen Victoria, the children of the Lords of Appeal in Ordinary, who are only peers for life, are given precedence before baronets.

Court of Judicature Acts,  
1873 (s. 11), 1875 (s. 6), 1877,  
1879, and 1881.)

## TABLE OF PRECEDENCE.

- \* The king's children and grandchildren
- \* ————— brethren.
- \* ————— uncles.
- \* ————— nephews.
- \* Archbishop of Canterbury.
- \* Lord Chancellor or Keeper,  
if a baron.
- \* Archbishop of York.
- Prime Minister.
- \* Lord Treasurer.
- \* Lord President of the Council.
- \* Lord Privy Seal,
- \* Lord Great Chamberlain,
- \* Lord High Constable,
- \* Lord Marshal,
- \* Lord Admiral,
- \* Lord Steward of the Household,
- \* Lord Chamberlain of the Household,
- \* Dukes.
- \* Marquesses.
- † Dukes' eldest sons.
- \* Earls.
- † Marquesses' eldest sons.
- † Dukes' younger sons.
- \* Viscounts.
- † Earls' eldest sons.
- † Marquesses' younger sons.
- \* Secretary of State, if a bishop.
- \* The Bishop of London.
- Durham.
- Winchester.

if barons.  
above all peers of their own degree.

- \* Bishops.
- \* Secretary of State, if a baron.
- \* Barons.
- † Speaker of the House of Commons.
- † Lords Commissioners of the Great Seal.
- † Viscounts' eldest sons.
- † Earls' younger sons.
- † Barons' eldest sons.
- || Knights of the Garter.
- || Privy Councillors.
- || Chancellor of the Exchequer.
- || Chancellor of the Duchy.
- || Chief Justice of the King's Bench (or of England).
- || Master of the Rolls.
- || Chief Justice of the Common Pleas (now obsolete).
- || Chief Baron of the Exchequer (now obsolete).
- The Judges [and Barons of the Coif].
- || Knights Bannerets, royal.
- || Viscounts' younger sons.
- || Barons' younger sons.
- Law Lords' children.
- || Baronets.
- || Knights Bannerets.
- † Knights of the Bath.
- † Knights Bachelors.
- || Baronets' eldest sons.
- || Knights' eldest sons.
- || Baronets' younger sons.
- || Knights' younger sons.
- † Colonels.
- † Serjeants-at-Law.
- † Doctors.
- † Esquires.
- † Gentlemen.
- † Yeomen.

[Esquires and gentlemen are confounded together by Sir Edward Coke, who observes, that every esquire is a gentleman (a). And a gentleman is defined to be one *qui arma gerit*, who bears coat armour, the grant of which adds gentility to a man's family; in like manner as civil nobility, among the Romans, was founded in the *jus imaginum*, or having the image of one ancestor at least who had borne some curule office. But it is somewhat unsettled, what constitutes the distinction of *esquire*; for it is not an estate, however large, that confers this rank upon its owner (b). Camden distinguishes esquires the most accurately, when he reckons up four sorts of them (c): (1) the eldest sons of knights, and their eldest sons, in perpetual succession (d), (2) the eldest sons of younger sons of peers, and their eldest sons in like perpetual succession; both which species of esquires, Sir Henry Spelman entitles *armigeri natalitii* (e), (3) esquires created by the King's letters patent, or other investiture, and their eldest sons (f), (4) esquires by virtue of their offices, *e.g.*, justices of the peace, and others who bear any office of trust under the Crown, and who are named esquires in their commission or appointment (g). To these may

‡ Tradesmen.

‡ Artificers.

‡ Labourers.

N.B. Married women and widows are entitled to the same rank among each other as their husbands would respectively have borne between themselves, unless such rank is merely professional or official; and unmarried women to the same rank as their eldest brothers would bear among men, during the lives of their fathers.

(a) 2 Inst. 668.

(b) *Perrins v. Marine Insurance Society* (1859) 2 El. & El. 317.

(c) 2 Inst. *ubi sup.*

(d) *Ibid.* 667.

(e) *Gloss.* 43.

(f) The creation of esquires by way of investiture has long been disused. When so created, they used to be invested *calcaribus argentatis*, to distinguish them from the *equites aurati*.

(g) See *Talbot v. Eagle* (1809) 1 Taunt. 510.



[be added barristers-at-law (*a*), the esquires of Knights of the Bath, whom, to the number of three, each knight constitutes at his installation, and all foreign peers, who as well as the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, and must be so named in all legal proceedings (*b*). As for *gentlemen*, says Sir Thomas Smith, they be made good cheap in this kingdom ; for whosoever can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman (*c*). A *yeoman* is he that hath free land of forty shillings by the year ; who was thereby formerly qualified to serve on juries, to vote for knights of the shire, and to do any other act which the law requires of one that is *probus et legalis homo* (*d*).

The rest of the commonalty are *tradesmen, artificers, and labourers* ; and as to these as well as others, it was provided by the 1 Hen, 5 (1413) c. 5, that they must be styled by the name and addition of their estate, degree, or mystery, and the place to which they belong, or where they have been conversant, in all indictments or other legal proceedings on which process of outlawry was to be awarded.] But no indictment under the law, as it now stands, is insufficient for want of, or by reason of any imperfection in, the addition, or description, of a defendant (*e*).

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|------------------------------------|------------------------------------|
| (a) <i>R. v. Brough</i> (1748) 1   | ch. xx.                            |
| Wils. 244.                         | (d) 2 Inst. 668.                   |
| (b) 3 Inst. 30 ; 2 Inst. 667.      | (e) <i>Vide post</i> , bk. vi. ch. |
| (c) <i>Commonw. of Eng.</i> bk. i. | xiv. vol. iv. pp. 307–308.         |

## CHAPTER X.

## OF MAGISTRATES AND OTHER PUBLIC OFFICERS.

[IN a former chapter of these Commentaries, we distinguished magistrates into supreme, and subordinate or secondary (*a*). Hitherto, we have considered the former kind only, viz. the supreme legislative power, or Parliament, and the supreme executive power, which is the King. We will now proceed to inquire into the rights and duties of the principal subordinate magistrates.

In this inquiry, however, we shall not be called upon to investigate the powers and duties of His Majesty's great officers or Principal Secretaries of State ; because they have not any considerable share of magistracy conferred upon them (*b*), and the functions which they exercise by virtue of certain modern statutes (*c*) are not of such a nature as to constitute them subordinate magistrates. Neither shall we here treat of the office and authority of the Lord Chancellor, or the other judges of the superior courts of justice ; because they will find a more proper place in a later part of these Commentaries (*d*). Nor, again, is this the place to speak of mayors and aldermen, or other officials engaged in the administration of local government, whose rights and duties will be discussed under

(*a*) See *ante*, p. 467.

(*b*) Com. Dig. *Officer*, E. 8 ;  
*Entick v. Carrington* (1765) 2  
 Wils. 275.

(*c*) *E.g.*, Prisons Act, 1835 ;

Fugitive Offenders Act, 1881,  
 Part I.

(*d*) *Post*, bk. v. chs. xi.,  
 xii. (vol. iii.).

[the Social Economy of the Realm (*a*). But the magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are those who are found dispersed throughout all parts of the kingdom bearing jurisdiction and authority ; that is to say, those representatives of the royal authority whose functions are confined to particular places, such as sheriffs, coroners, justices of the peace, and constables.

I. The *sheriff* is an officer of very great antiquity ; his name being said to be derived from two Saxon words, *scire geref*a—the reeve, bailiff, or officer of the shire. He is called in Latin *vice-comes*, not, as has been erroneously supposed (*b*), because he was the deputy of the earl or *comes* ;] for, as we have said (*c*), after the Norman Conquest the earl had nothing to do with the government of any county (except in the case of the palatine earldoms), and it was not to him but to the sheriff that the Crown committed the *custodiam comitatus*.

[Sheriffs were formerly chosen by the inhabitants of the several counties. In confirmation of which it was ordained by the *Articuli super cartas* (28 Edw. 1 (1300) c. 8), that the people should have the election of sheriffs in every shire where the shrievalty was not of inheritance. For antiently, in some counties, the sheriffs were hereditary ; and a shrievalty of inheritance might descend on, and be executed by, a female. For example, the shrievalty of Westmoreland, having been granted by King John to Robert de Veteripont and his heirs, vested at one period in Anne, Countess of Pembroke ; who exercised the office in person, and at the assizes at Appleby sat with the Judges on the bench (*d*).] Afterwards, this particular shrievalty came

(*a*) *Post*, bk. iv. pt. iii.  
chs. i. ii. vol. iii. pp. 2–52.  
(*b*) Dalton, *Sheriffs*, ch. 1.

(*c*) See *ante*, p. 700.  
(*d*) See Co. Litt., by Hargrave, 326.

by descent to the Earl of Thanet; and, on the death of that nobleman in 1849, without issue, it became a question whether the office passed under a devise thereof in his will, or escheated to the Crown. To remedy this inconvenience, all hereditary claims and title to the office of sheriff of Westmoreland were abolished in 1850 (a), and the Crown was empowered to appoint as in other counties; which provision is continued in the Sheriffs Act, 1887. The City of London, also, had at one time the inheritance of the shrievalty of Middlesex vested in its body under a charter of Henry the First, on condition of its paying 300*l.* a year to the King's Exchequer; and the Sheriffs Act, 1887 (b), recognised and continued this right of election. But the Local Government Act, 1888 (c), provided that the Crown, and not the City, should appoint the sheriff of Middlesex; that the Crown should appoint the sheriff for the county of London created by that Act; that, with the consent of the City, the sheriff of the county of London might exercise his jurisdiction in the City also (d); and that the City sheriffs should have no jurisdiction except in the City (e).

[The popular election of the sheriff, in all parts of the country, required also the royal approbation; and the But of the growing tumultuous, they were put an entompu 9 Edw. 2 st. 2 (1315), under which the sher to be thenceforth assigned by the chancellor, Treasurer, and judges. The Statute of Cambridge (12 Ric. 2 (1388) c. 2) ordained, that all that should be called to name or make justices of the peace, sheriffs and other officers of the King, should be sworn to act indifferently, and to appoint no man that sued either privily or openly to be put in office, but such only as they should

(a) 13 &amp; 14 Vict. c. 30.

(d) S. 40 (2).

(b) S. 33.

(e) S. 41 (8).

(c) S. 46 (6).

[judge to be the best and most sufficient (a). And the custom ever since the time of Fortescue (b), who was chief justice and chancellor to Henry the Sixth, has been, that all the judges, together with the other great officers and Privy Councillors, should meet in the Exchequer, now represented by the King's Bench Division of the High Court of Justice (c), on the morrow of All Souls (changed by the Michaelmas Term Act, 1751 (d), to the morrow of St. Martin, *i.e.*, 12th November), and then and there nominate three persons for each county, to be reported, if approved of, to the King, who afterwards appoints or 'pricks' one of them to be sheriff (e). And though in one instance it was laid down that Queen Elizabeth might, by her prerogative, make a sheriff without the election of the judges, *non obstante aliquo statuto in contrarium* (f), yet this was afterwards adjudged bad law; the doctrine of *non obstante*, which sets the prerogative above the law, having been effectually demolished by the Bill of Rights (g).] Under the Sheriffs Act, 1887 (h), the annual appointment of sheriffs is made at the Royal Courts of Justice on the 12th day of November in every year, in the manner heretofore in use, and by the same high officers, or two of them, together with the Judges, or three in æm. And by the same Act, in continuance of a similar provision in the Fines Act, 1833, whenever any person is duly pricked or appointed to be sheriff of any county, a warrant is to be made out and signed by the Clerk to the Privy Council, and transmitted by him

(a) See also 14 Edw. 3 (1340) st. 1, c. 7; 23 Hen. 6 (1445) c. 9; 21 Hen. 8 (1529) c. 20; Michaelmas Term Act, 1751, s. 12; Supreme Court of Judicature Act, 1873, s. 96.

(b) *De Leg. Angliæ*, cap. 24.

(c) Judicature Act, 1881, s. 16.

(d) S. 12.

(e) *I.e.*, by marking the name chosen with a *stylus* which pierces the roll.

(f) (1562) Dy. 225, 226.

(g) 1 W. & M. sess. 2 (1689), c. 2, s. 12.

(h) S. 6.

to the person so appointed ; and this appointment so made is of the same effect as if by patent under the Great Seal. A duplicate of the warrant is within ten days from the date thereof to be transmitted by the Clerk of the Privy Council to the Clerk of the Peace for the county ; and the sheriff so appointed continues in office until his successor is duly and fully appointed. In the event of his dying within the term of his office, the under-sheriff takes his place, and acts as *occasional* sheriff (*a*).

[Sheriffs, by virtue of several old statutes, are to continue in office for one year, and no longer ; and yet it hath been said, that a sheriff may be appointed *durante bene placito* (*b*), as indeed the form of their appointment expresses (*c*). The office determines therefore on their death, or by the appointment of their successor on the expiration of the year of office, whichever event first happens. Formerly it determined also on the demise of the Crown ; but it is not now determined by that event (*d*). By the Sheriffs Act, 1887 (*e*), continuing a like provision of the 1 Ric. 2 (1377) c. 11, no man that has served the office of sheriff for one year can be compelled to serve the same again within three years after, if there be any other sufficient person within the county.] But otherwise service of the office of sheriff is compulsory upon the party chosen ; and if he refuses to serve, having no legal exemption, he is liable to an indictment or information, which is usually compounded for by payment of a heavy fine (*f*). And it is said,

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| <p>(<i>a</i>) Sheriffs Act, 1887, s. 25.<br/>         (<i>b</i>) <i>Mitton's Case</i> (1584) 4 Rep. 32 b.<br/>         (<i>c</i>) <i>Dalt. Sheriffs</i>, 8.<br/>         (<i>d</i>) Sheriffs Act, 1887, s. 3.<br/>         (<i>e</i>) <i>Ibid.</i> s. 5.<br/>         (<i>f</i>) <i>Harrison v. Evans</i> (1767) 3 Bro. P. C. 465 ; <i>R. v. Wood-</i></p> | <p><i>row</i> (1788) 2 T. R. 731. (To the previously existing legal exemptions may be added service as an officer in the Territorial Forces during embodiment (Territorial Forces Act, 1907, s. 23 (3) ).)</p> |
|--|--|

that no man can be exempt from this office but by Act of Parliament or letters patent (*a*).

By the Sheriffs Act, 1887 (*b*), continuing a like provision contained in the 14 Car. 2 (1662) c. 21, no person may be assigned for sheriff, unless he have sufficient lands within the county to answer the King and his people (*c*); and as the sheriff may have the custody of men of the greatest property in the county, his own estate ought certainly to be large, that he may be above all temptation to permit them to escape, or to join them in their flight. In antient times, accordingly, this office was frequently executed by the nobility, and by persons of the highest rank in the kingdom, and not infrequently by bishops; though it is now committed, in general, to commoners, and exclusively to laymen (*d*).

The powers and duties of the sheriff are various, and are chiefly as follows.

1. He is charged with the duties already sufficiently expounded in regard to parliamentary elections (*e*); and he is bound to hold a sheriff's county court, whenever the holding of such court is required for the purpose of an election or for any other specific purpose, but not otherwise (*f*). To the sheriff also, writs for the trial by jury of disputed facts arising in certain classes of actions might, formerly, have been directed, under the Civil Procedure Act, 1833; but by the County Courts Act, 1867 (*g*), he was relieved from this burthen, though he still remains charged with the assessment of damages under writs of inquiry or interlocutory judgments, and also with the assessment of compensation in certain cases of compulsory

(*a*) Watson, *Office and Duty of a Sheriff*, p. 5.

(*b*) S. 4.

(*c*) 9 Edw. 2 (1315) st. 2; 2 Edw. 3 (1328) c. 4; 5 Edw. 3 (1331) c. 4.

(*d*) Spelm. *Gloss. Vice-com.*

(*e*) See *ante*, pp. 506–508.

(*f*) Sheriffs Act, 1887, s. 18;

*R. v. Diplock* (1869) L. R. 4 Q. B. 549.

(*g*) S. 6.

purchase under the Lands Clauses Consolidation Act, 1845. In these cases, the under-sheriff in fact acts as presiding officer.

2. [In his character as keeper of the King's peace, both by common law and special commission, the sheriff is, during his office, the second man in the county, and superior in rank to any nobleman, as such, therein (a). He may apprehend and commit to prison all persons who break the peace, or attempt to break it; he may bind any one in a recognisance to keep the peace; and he is bound, *ex officio*, to pursue and take all traitors, murderers, and other misdoers, and to commit them to gaol for safe custody. He is also to defend his county against any of the King's enemies when they come into the land, and for this purpose, as well as for keeping the peace and pursuing offenders, he may command all the people of his county (or *posse comitatûs*) to attend him (b). Which summons every person who has no lawful excuse is bound upon due warning to attend (c), under pain of fine and imprisonment (d).]

3. The sheriff is also bound to execute all process issuing from the High Court of Justice. He is bound, under pain of punishment for contempt, to attend on the Judges, when they come into the county at the assizes, on which occasion he attends with javelin men to keep order. But, by the County and Borough

(a) *Chune v. Pyot* (1616) 1 Roll. Rep. 327. Till 1904, he took precedence, even of the (Lord) Lieutenant. But in that year a Warrant of the Crown gave the latter precedence.

(b) Dalt. ch. xcv.; Sheriffs Act, 1887, s. 8.

(c) The precise extent of the liability to join the *posse comitatûs* seems to be somewhat obscure, though the liability itself is clear. Black-

stone (i. 332), following Lambard, considers that peers and persons under the age of fifteen years are exempt; it is difficult to suppose that a woman would be held liable. Probably the Court would accept any reasonable excuse; but it will not allow an able-bodied man to shirk his obvious duty.

(d) 2 Hen. 5 (1414) st. 1, c. 8; Sheriffs Act, 1887, s. 8.



Police Act, 1859, the magistrates of the county may, if they think fit, direct order to be kept at the assizes by the county police instead ; and this provision is continued by the Sheriffs Act, 1887 (*a*). In civil causes, supposing the case to be such that an order issues from the High Court for the arrest and imprisonment of the defendant under the provisions of the Debtors Act, 1869, in order to prevent his quitting England and so prejudicing the plaintiff in the prosecution of his action, the sheriff is required to effect the arrest, and to take the prescribed security that the defendant will not quit England without leave of the Court (*b*). In any action, when the cause comes to trial, he must summon and return the jury, when a jury is required ; and when the trial is ended, he must see the judgment of the Court carried into execution (*c*). In all these matters, the sheriff, like most other ministerial officers, is liable, at the suit of the party grieved, to an action for the negligent or improper discharge of his duty, *e.g.*, for an escape (*d*).

In criminal matters, also, the sheriff returns the jury ; and he is responsible for the due execution of the sentence of the Court, though it extends to the infliction of death itself (*e*). But the sheriff is, by

(*a*) S. 9.

(*b*) Debtors Act, 1869, s. 6.

(*c*) As to fees and poundage payable to the sheriff on the execution of civil process, see Sheriffs Act, 1887, s. 20 ; and *Maybery v. Mansfield* (1846) 9 Q. B. 754 ; *Miles v. Harris* (1862) 12 C. B. (N.S.) 550 ; *Shoppee v. Nathan & Co.* [1892] 1 Q. B. 245.

(*d*) Formerly he was liable for the escape of prisoners (*Barrack v. Newton* (1841) 1 Q. B. 525 ; *Gordon v. Laurie* (1846) 9 Q. B. 60) ; but this

is now otherwise as regards prisoners confined in any prison subject to the Prison Act, 1877. (See Sheriffs Act, 1887, ss. 16, 29 (1) (*c*).)

(*e*) Sheriffs Act, 1887, s. 13. As to his jurisdiction and responsibility in respect of prisoners under sentence of death, see the Prison Acts, 1865 and 1877, s. 32 ; and as to his duties in respect of persons arrested on civil process, see the Sheriffs Act, 1887, s. 14.

the express directions of the Great Charter (*a*), forbidden to hold any pleas of the Crown, *i.e.*, to try any criminal charge; and by the Sheriffs Act, 1887, which continues that provision, his tourn (*i.e.*, his half-yearly *tour* through the hundreds of the county as a royal commissioner, to hold a court in each) (*b*) is abolished. Neither may the sheriff act as an ordinary justice of the peace during the time of his office (*c*). For that would be equally inconsistent; the sheriff being in many respects the servant of the justices.

Though the sheriff's authority extends, in general, over the whole of his county, yet there formerly existed many *liberties* within counties which were exempt from the sheriff's jurisdiction. Thus, any town being a county of itself was also, in general, exempt from the jurisdiction of the county within which it was situate, and had a sheriff of its own; and this exemption is recognised by the Sheriffs Act, 1887 (*d*). Other liberties were districts in regard to which grants were formerly made by the Crown to individuals; conferring on them or their bailiffs the exclusive privilege, or franchise, of executing legal process therein (*e*). And when it became necessary to execute a writ within such a liberty, the course was to direct it to the sheriff of the county as in ordinary cases; but the execution of it belonged by law to the bailiff of the liberty, unless, as was usually done (*f*), the writ was framed with a clause of *non omittas*, specially authorising the sheriff to enter. And now, by the Sheriffs Act, 1887 (*g*), while these liberties are recognised, it is provided that the lord of the liberty (in the Act called the bailiff of the franchise) shall either hold the office himself or

(*a*) Cap. 24.

(*b*) Pollock and Maitland, *Hist. of Engl. Law*, vol. i. pp. 530, 558.

(*c*) 1 Mar. (1554) sess. 2, c. 8, repealed and re-enacted

by Sheriffs Act, 1887, s. 17.

(*d*) Ss. 34–36.

(*e*) 5 Geo. 2 (1732) c. 27, s. 3.

(*f*) *Cf.* Rules of the Supreme Court, App. H., No. 7.

(*g*) S. 34.

appoint responsible bailiffs, for whom he shall be answerable, for the return and execution of writs ; and the sheriff is to appoint a deputy at the lord's expense, to reside in or near the franchise, and receive and open in the sheriff's name all writs, the return or execution of which belongs to the bailiff of the franchise, issuing to the bailiff the warrant required for the due execution of the writs. The bailiff of the franchise then becomes liable for the non-execution, mis-execution, or insufficient return of the writs, and for all misconduct incident thereto ; and, in case of the *non-return* of any such writ, the sheriff, on returning that he has delivered the writ to the bailiff, may be ordered to execute the writ notwithstanding the franchise, and to cause the bailiff to attend before the High Court, to answer for his non-execution of the writ.

4. [It is the sheriff's duty also, as the King's bailiff, to preserve the rights of the Crown within his 'bailiwick'; for so his county is frequently called in the writs (a). He therefore seizes to the King's use all lands devolving upon the Crown by escheat for want of heirs ; levies all fines and forfeitures ; and seizes and keeps all waifs, wrecks, estrays, and the like, unless they be granted to some subject (b). He was formerly charged also with collecting the King's rents within his bailiwick ; but he has now been relieved of this latter duty (c).

To execute these various offices, the sheriff has under him many inferior officers, viz., an under-sheriff, a deputy, and bailiffs. These must neither buy, sell, nor farm their offices, on forfeiture of 500*l.* (d) ;] and the sheriff himself may not 'let to ferm' his county,

(a) Fortescue, *De Leg.* cap. 24.      auditing the sheriff's accounts, &c.

(b) Dalt. ch. 9. See the      (c) Fines Act, 1833, s. 12.

Fines Act, 1833, and the      (d) Estreats Act, 1716 ;  
Sheriffs Act, 1887, ss. 21, 22,      Sheriffs Act, 1887, s. 27.

as to the regulations for

or any part thereof (a). By the Sheriffs Act, 1887 (b), continuing a like provision in the Fines Act, 1833, it is provided, that every sheriff shall, within one calendar month next after the notification of his appointment in the *London Gazette*, by writing under his hand, nominate some fit person to be his *under-sheriff*, and transmit a duplicate thereof to the Clerk of the Peace of the county, to be by him filed among the records of his office. And, by the same Act (c), every sheriff is to appoint a sufficient *deputy*, having an office within a mile of the Inner Temple Hall, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting all rules and orders made as to the execution of any process or writ directed to the sheriff (d).

The under-sheriff usually performs all the duties of the office of sheriff, except the few in which the personal presence of the sheriff is necessary; but the under-sheriff is only to a certain extent recognised by the law (e). For the law holds the sheriff himself responsible, in general, for all acts done or omitted by his under-sheriff; and considers the latter, where the duty is improperly performed, as exempt from any action for negligence at the suit of the party grieved (f). There was formerly a rule, enacted or at least recognised by statute (g), that no under-sheriff should abide in his office above one year; but this rule seems to be now regarded as obsolete. And, by the express provisions of the Sheriffs Act, 1887 (h), if the sheriff dies, the under-sheriff is to continue in his office until a new high sheriff is appointed.

(a) Sheriffs Act, 1887, s. 19. s. 23 (3).

(b) *Ibid.* s. 23.

(c) S. 24.

(d) *Woodland v. Fuller*  
(1840) 11 A. & E. 859.

(e) *E.g.*, Territorial and  
Reserve Forces Act, 1907,

(f) *Cameron v. Reynolds*  
(1776) Cowp. 403.

(g) 42 Edw. 3 (1368) c. 9;  
23 Hen. 6 (1444) c. 7.

(h) S. 25.

[Bailiffs' or sheriffs' officers (*a*) are either *bailiffs of hundreds* or *special bailiffs*. Bailiffs of hundreds are appointed over those respective districts, by the sheriffs, to collect fines therein and to summon juries; to attend the judges and justices at the assizes and quarter sessions; and to execute writs and processes in the several hundreds (*b*). But, as these are generally plain men, and not much inclined to this latter part of their office, viz., that of serving writs, making arrests, and levying executions, it is now usual to join other bailiffs with them; who are generally mean persons, employed by the sheriffs on account only of their adroitness and dexterity in hunting and seizing their prey. The sheriff being civilly responsible for the official misdemeanours of these bailiffs (*c*), they are therefore annually bound to him in an obligation with sureties for the due execution of their office, and thence are called 'bound bailiffs'; which the common people have corrupted into a much more homely appellation.] It is to be observed, however, that, besides these officers, the sheriffs may appoint, on the application of any party to a civil suit, persons named by that party, for the purpose of executing any particular process therein; and persons so appointed are properly called *special bailiffs*. Whenever a party thus chooses his own officers, he is held to guarantee the sheriff from all responsibility for what is done by them in the execution of the process (*d*).

(*a*) Besides the *sheriff's bailiffs*, there are also *bailiffs of liberties* (*ante*, pp. 723–724); *bailiffs of county courts* (as to whom, see the County Courts Act, 1888, ss. 33–37); and *bailiffs of inferior courts* generally (as to whom, see the Inferior Courts Act, 1844); *Braham v. Watkins* (1846) 16 M. & W. 77; *Tarrant v.*

*Baker* (1853) 14 C. B. 199).

(*b*) As to bailiffs' fees, see *Walbank v. Quarterman* (1846) 3 C. B. 94.

(*c*) *Drake v. Sikes* (1797) 7 T. R. 113; *Barsham v. Bullock* (1839) 10 A. & E. 23.

(*d*) *Ford v. Leche* (1837) 6 A. & E. 699; *Balson v. Meggat* (1836) 4 Dowl. 557; *Alderson v. Davenport* (1844) 13 M. &

[II. The coroner's is also a very antient office at the common law (a), though not indeed of equal antiquity with that of the sheriff; for the general institution of coroners appears to have been no earlier than, and due to an ordinance of, 1194, although there are traces at a more remote time of an office of keeping the pleas of the Crown (b).

The holder of this office is called coroner (*coronator*), because he was formerly charged with keeping the pleas of the Crown, or those wherein the King was more immediately concerned (c); and in this light, the Lord Chief Justice is the principal coroner of the kingdom, and may, if he pleases, exercise the jurisdiction of a coroner in any part of the realm (d). But there are also particular coroners for every county in England; usually four, but sometimes six, and sometimes a smaller number (e).

The coroner used to be chosen by the freeholders at a county court held by the sheriff for the purpose; and by the writ *de coronatore eligendo* (f), it was expressly commanded the sheriff, *quod talem eligi faciat qui melius et sciat, et velit, et possit, officio illi intendere.*] But, by the Local Government Act, 1888 (g), the writ *de coronatore eligendo* is now to be directed to the county council; and the county council are made the electors.

[In order to secure that the persons to be elected coroners should be of suitable estate, it was enacted by the Statute of Westminster the First (h), that none

W. 42; *Botten v. Tomlinson* (c) 2 Inst. 31; 4 Inst. 271.  
(1847) 16 L. J., C. P. 138. (d) *Sadler's Case* (1588) 4

(a) See Jervis, *Office and Duties of Coroners*; Com. Dig. Rep. 57.  
*Officer*, G.; Gross, *Introduction to Select Coroners' Rolls* (Selden Society). (e) F. N. B. 163.

(b) Pollock and Maitland, (f) *Ibid.*; County Coroners Act, 1860, s. 9.

*Hist. of Engl. Law*, vol. i. (g) S. 5, repealing s. 11 of the Coroners Act, 1887.  
p. 534. (h) 3 Edw. 1 (1275) c. 10.

[but lawful and discreet knights should be chosen as coroners. But it was subsequently thought sufficient (a), if a man had lands enough to be made a knight; that is, lands to the amount of 20*l.* per annum, a qualification very inadequate, in modern times, to the object. And accordingly, at one period it was made matter of complaint that the office of coroner was no longer undertaken by gentlemen of property; and that though formerly no coroners would condescend to be paid for serving their country, they now only desired to be chosen for the sake of the perquisites.] In our own times, however, the coroners have been in general persons of unquestionable respectability, and their position in life such as to cast no discredit on their employment. But by the Coroners Act, 1887 (b), it is still required, that every coroner for a county shall have land in fee sufficient in the county to answer to all manner of people (c).

By the Coroners Act, 1844 (d), coroners may be appointed for *districts* within counties, instead of for the county at large; and by the County Coroners Act, 1860, all former provisions for the remuneration of county coroners by fees, mileage, and allowances were repealed, and in lieu thereof they are to be paid by salary (e). With respect to the appointment of coroners, however, it is to be observed, that the Crown, as regards the coroner of the household, and certain lords of franchises, as regards franchise-coroners, may appoint coroners for the household and for their respective liberties or franchises, by their own mere grant, and without election (f). And by the Municipal Corporations Act,

(a) F. N. B. 163; Com. Dig. Officer, G. 4.

(b) S. 12.

(c) 14 Edw. 3 (1340) st. 1, c. 8.

(d) Ss. 1-6.

(e) County Coroners Act, 1860, ss. 3, 4; Act of 1887, s. 43.

(f) Coroners Act, 1887, ss. 29-32.

1882 (a), the council of every borough having a separate court of quarter sessions is enabled to appoint a fit person to be coroner for the borough; though by a later enactment (b) this power is restricted to quarter sessions boroughs which are also county boroughs, or have a population of 10,000.

[The coroner is chosen for life, but may be removed by being made sheriff; the one office being deemed incompatible with the other. He may also be removed by the writ *de coronatore exonerando*, for a cause to be therein assigned; as that he is engaged in other business, is incapacitated by years or sickness, hath not a sufficient estate in, or lives in an inconvenient part of, the county (c).] The matter has also been dealt with by statute; for by the Coroners Act, 1887 (d), the Lord Chancellor may remove any coroner for inability or for misbehaviour. And by the same statute (e), if a coroner is adjudged guilty of extortion or corruption, of wilful neglect of duty, or of misbehaviour in the discharge of his duty, the Court convicting him may remove him from his office; and a new coroner is in such case to be duly appointed in his place. But nothing in the Act is to prejudice the jurisdiction of the Lord Chancellor, or the High Court, as to the removal of, or otherwise in relation to, a coroner (f).

An Act of the year 1843 (g), after a preamble to the effect that, at the time of that Act passing, the coroners of boroughs and liberties were empowered by law to appoint *deputies* to act in their stead in certain cases, but that the coroners of counties were not, provided that it should be lawful for every coroner of a county, city, riding, liberty, or division, by writing under his

(a) S. 171.

(b) Local Government Act 1888, ss. 3, 5, 34, 38 (5).

(c) F. N. B. 163, 164; *Ex parte Parnell* (1820) 1 Jac. and

Walk. 451.

(d) S. 8 (1).

(e) S. 8 (2).

(f) S. 35.

(g) 6 & 7 Vict. c. 83.



hand and seal, to appoint from time to time a proper person, to be approved by the Lord Chancellor, to act for him as his deputy in the holding of inquests, or during his illness or absence from any lawful or reasonable cause (*a*). And, by the Coroners Act, 1892, every coroner, whether for a county or a borough, is both enabled and required to appoint a deputy, who must be a person approved by the chairman or mayor, as the case may be, of the council (*b*).

[The office and power of a coroner are also, like those of a sheriff, either judicial or ministerial; but principally judicial. This is, in great measure, ascertained by the 4 Edward 1 (1276), *De Officio Coronatoris*, and consists, principally, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death.] When such a death happens, it is the duty of the township to give notice of it to the coroner (*c*); and a similar duty is incumbent upon every one having charge of an infant who dies in a home licensed for the reception of infants under the age of seven years under the Children Act, 1908 (*d*). The coroner thereupon, in virtue of the provisions of the Coroners Act, 1887 (*e*), if there is reasonable cause to suspect that the death was violent, or unnatural, or inexplicably sudden, or took place in prison, or in any other proper case (*f*), is to issue his warrant for the summoning of not less than twelve nor more than twenty-three good and lawful men, to inquire as jurors touching the death. If a coroner refuse or neglect to hold an inquest, the Attorney-

(*a*) *R. v. Perkin* (1845) 7 Q. B. 165.

(*b*) 55 & 56 Vict. c. 56, s. 1.

(*c*) *R. v. Justices of Kent* (1809) 11 East, 229.

(*d*) S. 6 (1).

(*e*) S. 3.

(*f*) In the case of an infant

whose death is reported under the provisions of the Children Act, 1908, above alluded to, the coroner is not bound to hold an inquest if a proper certificate as to the cause of death is forthcoming (s. 6 (1)).

General may apply to the King's Bench Division for a rule calling on him to show why the inquest should not be held (a).

The inquisition of the coroner must be held before the coroner as presiding officer ; and his court is a court of record (b). The jury are to be sworn and charged by the coroner, to inquire how the party came by his death (c). [The inquisition must be had *super visum corporis* ; and at the first sitting of the inquest, the coroner and jurors must view the body (d). For if the body be not found, the coroner cannot sit ; except by virtue of a special commission issued for the purpose (e). By the common law, he was bound also to sit at the very place where the death happened, though not necessarily at the same place where the body was viewed ; for the jury might have adjourned elsewhere to see the body if found more convenient (f).] Subsequently, however, by the Coroners Act, 1843, it was provided, that only the coroner within whose jurisdiction the body was *lying dead*, should hold the inquest, though the cause of death might not have arisen within his jurisdiction ; and that in the case of any body found dead in the sea, or in any creek, river, or navigable canal within the flowing of the sea, (where there should be no deputy coroner for the jurisdiction of the admiralty of England,) the inquest should be held only by the coroner having jurisdiction in the place where the body was first brought to land (g).

(a) Coroners Act, 1887, s. 6.

(b) 4 Inst. 271 ; *Garnett v. Ferrand* (1827) 6 B. & C. 611.

(c) Coroners Act, 1887, s. 3 (3).

(d) *Ibid.* s. 4 (1).

(e) 2 Hale, P. C. 58 ; 2 Hawk. P. C. ch. ix. s. 23 ; *R. v. Ferrand* (1819) 3 B. & Ald. 260.

(f) 2 Hawk. P. C. ch. ix. s. 25 ; *R. v. Great Western Rail. Co.* (1842) 3 Q. B. 340.

(g) *R. v. Hinde* (1844) 5 Q. B. 944 ; *R. v. Ellis* (1846) 2 Car. & Kir. 470. These provisions are substantially continued by the Act of 1887 (s. 7).

At this inquisition, the coroner and jury must hear such evidence as is offered, to be given on oath (*a*) or affirmation (*b*) ; and whenever it appears to the coroner that the deceased was attended at his death, or during his last illness, by any legally qualified medical practitioner, he may order the attendance of such practitioner as a witness at the inquest, and, where the deceased was not so attended, the attendance of any legally qualified medical practitioner, being at the time in actual practice in or near the place where the death happened (*c*). The Coroners Act, 1887 (*d*), further enables the coroner to examine all persons whomsoever having knowledge of the facts, whom he may think it expedient to examine ; and he may also direct a *post mortem* examination, with or without an analysis of the contents of the stomach or intestines, provided, that if a sworn statement be made to him of the belief of the deponent, that the death was caused entirely or in part by the improper or negligent treatment of any person by him named, that person shall not be allowed to perform or assist at the *post mortem* examination (*e*). Moreover, when it shall appear to the majority of the jury that the cause of death has not been satisfactorily explained by the witnesses in the first instance, they may name to the coroner, in writing, any other legally qualified practitioners, and require their attendance as witnesses, or for a *post mortem* examination ; whether one shall have been previously performed or not (*f*).

The verdict must be found with the concurrence of at least twelve of the jury (*g*) ; and there are provisions

(*a*) *R. v. Scorey* (1748) 1 Leach, C. C. 43 ; 2 Hale, P. C. 62.

(*b*) Oaths Act, 1888.

(*c*) Act of 1887, s. 21.

(*d*) *Ibid.* s. 4 (1).

(*e*) *Ibid.* s. 21 (2).

(*f*) *Ibid.* s. 21 (3).

(*g*) 2 Hale, P. C. 161 ; *Lambert v. Taylor* (1825) 4 B. & C. 138. By the Births and Deaths Registration Act, 1874, ss. 16, 20 (3), the coroner is directed, after the

to prevent the inquisition being quashed on account of merely technical defects (*a*). If by the verdict any person be found guilty of murder or other homicide, or of being an accessory to murder before the fact, the coroner is to commit him to prison for further trial ; and he must deliver the inquisition, duly certified under his own seal and the seals of the jurors, to the proper officer of the Court in which the trial is to be (*b*). But, in general, the Crown does not proceed upon a coroner's inquisition, unless the accused has also been committed for trial by a magistrate, and an indictment has been presented against him accordingly. The coroner is required to deliver the depositions of the witnesses to the officer of the court where the trial is to be (*c*) ; and has authority to bind by recognisance all who know or declare anything material touching such offence, to appear at such court, either to prosecute or to give evidence against the party charged (*d*). Under the provisions of the same section, the coroner may, on a verdict of manslaughter, at his discretion, accept sufficient bail for the person so charged, for his appearance to take his trial at the next assize and general gaol delivery for the county (*e*).

It may be here noticed, that, by the Capital Punishment Amendment Act, 1868 (*f*), the coroner of the jurisdiction to which the prison belongs, wherein

inquest, to inform the Registrar of Deaths for the district of the finding of the jury as to the particulars of death required to be registered. (See also Coroners Act, 1887, s. 45, and Sched. III.)

(*a*) Act of 1887, s. 20, amending Act of 1843 ; *R. v. Evett* (1827) 6 B. & C. 247 ; *In re Culley* (1833) 5 B. & Ad. 230 ; *In re Daws* (1838) 8 A. & E. 936.

(*b*) Act of 1887, s. 5.

(*c*) *Ibid.* s. 5 (3). (See also Prosecution of Offences Act, 1879, s. 5.)

(*d*) Act of 1887, s. 5 (1).

(*e*) There is a special provision for carrying over the warrant if the trial cannot take place at the next assizes (Assizes and Quarter Sessions Act, 1908, s. 1 (4).)

(*f*) Ss. 5, 13.

judgment of death is executed on any offender, is expressly required to hold an inquest on the body within twenty-four hours after the execution ; and to inquire thereat into, and ascertain the identity of, the body, and whether the judgment was duly executed on the offender. At such inquest neither any officer of the prison, nor any prisoner confined therein, may be a juror (*a*).

[Another branch of the coroner's office is to inquire concerning treasure trove, who were the finders, and where the treasure is, and whether any one be suspected of having found and concealed it (*b*) ; but although it was formerly part of his duties to inquire concerning a shipwreck, and to certify whether it was a proper wreck or not, and who were in possession of the goods, he is now relieved of that duty, and also of the duty of holding inquests on royal fish (*c*). He does not now hold the pleas of the Crown ; or inquire as to the goods of felons ; or hold any inquest of felonies, save on inquisitions of death (*d*).

The coroner, as conservator of the King's peace, becomes also a magistrate by virtue of his appointment ; having power to cause offenders to be apprehended, whether an inquisition has been found against them or not (*e*).

The ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff for suspicion of partiality—as that he is interested in the action, or of kindred

(*a*) Coroners Act, 1887, s. 3 (2).

(*b*) *Ibid.* s. 36 ; *A.-G. v. Moore* [1893] 1 Ch. 676.

(*c*) Act of 1887, s. 44.

(*d*) *Ibid.*

(*e*) Jervis, *Coroners* (2nd

edn.), p. 30. A justice of the peace is not disqualified from acting by being elected coroner (*Davis v. Justices of Pembrokeshire* (1881) 7 Q. B. D. 513).

[to either plaintiff or defendant—the process must then be awarded to the coroner, and not to the sheriff (*a*).

III. The common law hath ever had a special care and regard for the conservation of the peace ; and, therefore, before the present constitution of justices of the peace was invented, there were peculiar officers appointed by the common law, for the maintenance of the public peace. Of these some had, and still have, this power annexed to other offices which they hold ; while others had it merely by itself, and were thence named *custodes* or *conservatores pacis*. Those that were so *virtute officii* still continue ; but the latter sort are superseded by the modern justices.

The King is, by his office and dignity royal, the principal conservator of the peace within all his dominions (*b*) ; and the Lord Chancellor or Keeper, the Lord Treasurer, the Lord High Steward of England, the Lord Marshal, and the Lord High Constable of England (when any such officers are in being), the Judges of the High Court by virtue of their offices, and the Master of the Rolls by prescription, are also conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognisances to keep it (*c*). The coroner is also, as we have seen, a conservator of the peace within his own county (*d*), as is the sheriff (*e*) ; and each may take a recognisance or security for the peace. Constables, tithing men, and the like, are also conservators of the peace within their own jurisdiction ; and may apprehend all breakers of the peace, and commit them till they find sureties for keeping it (*f*).

Those that were, without any office, simply and

(*a*) 4 Inst. 271 ; Coroners Act, 1887, s. 15.

(*b*) Lambard, *Eirenarch*. 12

(*c*) *Ibid.* 12.

(*d*) Britton, 3.

(*e*) F. N. B. 81.

(*f*) Lamb. 14.

[merely conservators of the peace, either claimed that power by prescription (a), or were bound to exercise it by the tenure of their lands (b), or were chosen by the freeholders in full county court before the sheriff; the writ for their election directing them to be chosen *de probioribus et potentioribus comitatus sui in custodes pacis* (c). But when Queen Isabel, the wife of Edward the Second, had contrived to depose her husband and to set up his son Edward the Third in his place, the new King, or his mother in his name, sent writs to all the sheriffs in England (the form of which writs is preserved by Thomas Walsingham (d)) giving a plausible account of the manner of his obtaining the Crown, and withal commanding each sheriff that the peace be kept throughout his bailiwick, on pain and peril of disinherittance and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in Parliament, that, for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil or barretors, should be *assigned* to keep the peace (e); which assignment was construed to be by the King's commission (f). And when, shortly afterwards, the 34 Edw. 3 (1360) c. 1, gave them the power of trying felonies, they acquired the more honourable appellation of Justices of the Peace (g), and were uniformly thereafter assigned by the King, and no longer chosen by the freeholders.

The justices of the peace for each county, who are usually called the County Justices, are generally selected on the recommendation of the Lord Lieutenant of the

(a) Lamb. 15.

(b) *Ibid.* 17.

(c) *Ibid.* 16.

(d) *Hist. A.D.* 1327.

(e) 1 Edw. 3, st. 2 (1326), c. 16; Lamb. 20.

(f) 4 Edw. 3 (1330) c. 2;

18 Edw. 3 (1344) st. 2, c. 2.

(g) Lamb. 23; 36 Edw. 3 (1362) c. 12; Reeves, *Hist. Eng. Law*, vol. ii. p. 472; vol. iii. pp. 216, 242, 265, 290; vol. iv. p. 154; *Harding v. Pollock* (1829) 6 Bing. 25.

[county (a), and are appointed by special commission under the Great Seal, the form of which was settled by the judges, in the year 1590, and continues with little alteration to this day (b). According to that form, the appointment is of them all, jointly and severally, to keep the peace in the particular county named (c); and of any two or more of them to inquire of and determine offences in such county committed. In accordance with ancient custom, some particular Justices, or one of them, was or were directed to be always included in such number, and no business to be done without their presence; the words of the commission running thus, *quorum aliquem vestrum A. B. C. D. &c. unum esse volumus*, whence the persons so named are usually called justices of the *quorum*. But this custom gradually fell into disuse, or became a mere formality; and now, under the provisions of the Crown Office Act, 1877 (d), provision is made for the keeping of a proper record of all Justices of the Peace appointed by royal commission, and its ratification from time to time. And no exception is now allowable, for not expressing in the form of warrants and other documents, that the Justice who issues them is of the *quorum* (e).

When any Justice named in the commission intends

(a) As to the Justices in boroughs, see *post*, bk. iv. pt. iii. ch. ii. (vol. iii. pp. 30–31). As to the justices in and near the metropolis (and the commissioners and assistant commissioners, receiver, and constables of the police of the metropolis), see the numerous Metropolitan Police Acts.

(b) Lamb. 43. (See the form of the writ, *ibid.* 36.)

(c) As to the power of county magistrates to act in counties corporate and other places of exclusive jurisdic-

tion within the county, see Poor Relief Act, 1722, s. 3; Indictable Offences Act, 1848, s. 6. As to their jurisdiction in respect of boroughs within their county, see now the Municipal Corporations Act, 1882, s. 154. As to their power in detached parts of other counties, see Counties (Detached Parts) Act, 1839; Indictable Offences Act, 1848, s. 7.

(d) S. 5 (1).

(e) Justices Act, 1753; Justices Quorum Act, 1766.



[to act under it, he must take the oaths of office required of him.] These oaths are the judicial oath and the oath of allegiance prescribed by the Promissory Oaths Act, 1868 (*a*). And it is to be observed, that Justices of the Peace act gratuitously, receiving neither salary nor fees; except that in certain populous districts, viz., in the metropolis and elsewhere, it has become the practice to appoint paid (or *stipendiary*) magistrates, any one of whom has the power of two Justices of the Peace sitting in Petty Sessions (*b*).

[Touching the number and qualifications of these Justices, it was ordained by the 18 Edw. 3, st. 2 (1344) c. 2, that two or three of the best reputation in each county should be assigned to be keepers of the peace. But these being found rather too few for that purpose, it was provided by the 34 Edw. 3 (1360) c. 1, that one lord and three or four of the most worthy men in the county, with some learned in the law, should be made Justices in every county. Afterwards the number of Justices, through the ambition of private persons, became so large, that it was thought necessary, by the 12 Ric. 2 (1388) c. 10, and 14 Ric. 2 (1390) c. 11, to restrain them at first to six, and afterwards to eight in each county. But this rule is now disregarded, and the cause seems to be (as Lambard observed long ago) that the growing number of statute laws committed from time to time to the charge of Justices of the Peace has occasioned also, and very reasonably, a corresponding increase in the number of the Justices (*c*).

(*a*) See also Promissory Oaths Act, 1871, s. 2.

(*b*) See Metropolitan Police Courts Act, 1839, s. 9; Indictable Offences Act, 1848, s. 29; Summary Jurisdiction Act, 1848, s. 33; Stipendiary Magistrates Acts, 1858 and 1863; Municipal Corporations Act, 1882, s. 161; and

as to the *deputies* of stipendiaries, see Stipendiary Magistrates Act, 1869; Recorders, Stipendiaries, and Clerks of the Peace Act, 1906.

(*c*) Lamb. 34. A good many chairmen of local governing bodies are now *ex-officio* Justices of the Peace. (See Local Government Acts,

[As to their qualifications, the statutes just cited direct the Justices to be of the best reputation, and most worthy men in the county ; and the statute 13 Ric. 2, st. 1 (1390) c. 7, ordered them to be of the most sufficient knights, esquires, and gentlemen of the law. Under the 2 Hen. 5, st. 1 (1414) c. 4, and st. 2, c. 1, they were required to be resident in their several counties ; but now, under the Justices of the Peace Act, 1906, it is sufficient if a Justice resides within seven miles of his county, and further, by the Indictable Offences Act, 1848, any Justice of the Peace for two or more adjacent counties may act in either or any of them, if resident in one. And because, contrary to the antient statutes above mentioned, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by the 18 Hen. 6 (1439) c. 11, that no Justice should be put in the commission, if he had not lands to the value of 20*l.* per annum ; and, the value of money becoming subsequently greatly altered, it was provided by the Justices Qualification Acts, 1731 and 1744, that every County Justice, with certain exceptions, must have an estate in possession of the clear yearly value of 100*l.*, or else a reversion or remainder, with reserved rents of the clear yearly value of 300*l.* (a).] The Justices Qualification Act, 1875, however, allowed an alternative qualification ; namely, occupation for two years immediately preceding the appointment as Justice of a dwelling-house assessed to Inhabited House Duty at a value of not less than 100*l.*, and fully rated ; the house being situate in the county, riding, or division, for which the Justice was appointed. The property qualification for County Justices has, however, now been entirely abolished by the Justices of the

1888, s. 2 (5) ; 1894, s. 22 ;      (a) *Pack v. Tarpley* (1839)  
 London Government Act, 9 A. & E. 468 ; *Woodward v.*  
 1899, s. 24 (1).      *Watts* (1853) 2 El. & Bl. 452.

Peace Act, 1906 ; and it will be observed that a property qualification has never been required in the case of borough Justices (*a*).

[As the office of these Justices is conferred by the Crown, so it subsists only during the Crown's pleasure, and is determinable in any one or other of the following five events, namely :—(1) by express writ under the Great Seal, discharging any particular person from being any longer Justice (*b*) ; (2) by superseding the commission by writ of *supersedeas*, which suspends the power of all the Justices, but does not totally destroy it, seeing it may be revived again by another writ, called a *procedendo* ; (3) by a new commission, which virtually, though silently, discharges all the former Justices that are not included therein, for two commissions cannot subsist at once for the same place ; (4) by accession to the office of sheriff, which, as we have just seen, disqualifies during the year of shrievalty (*c*). Formerly it was thought, that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, this determined his office ; seeing that he no longer answered the description in the commission. But afterwards it was provided, that, notwithstanding the accession to such new title of dignity, the Justice on whom it was conferred should still continue a Justice (*d*) ; ] (5) by bankruptcy. For it is provided by the Bankruptcy Act, 1883 (*e*) (as amended by the Act of 1890) (*f*), that a debtor adjudged bankrupt shall be disqualified from being appointed or acting as a Justice of the Peace,

(*a*) The acts of a Justice not possessing the property qualification were always valid, though he acted at his own peril ; but this rule does not apply in the case of a Justice disqualified by reason of being sheriff (*Margate Pier Company*

*v. Hannam* (1819) 3 B. & Ald. 266 ; Sheriffs Act, 1887, s. 17).

(*b*) Lamb. 68.

(*c*) 1 Mar. (1554) st. 2, c. 8.

(*d*) 1 Edw. 6 (1547) c. 7.

(*e*) S. 32.

(*f*) S. 9.

until either his adjudication is annulled, or he obtains his discharge with a certificate that his bankruptcy was caused by misfortune and not by misconduct, or otherwise till five years from such discharge. An *ex-officio* Justice of the Peace may be discharged from his office in the same way as an ordinary Justice (a).

[The power, office, and duty of a Justice of the Peace depend on his commission, and on the several statutes which have enlarged his jurisdiction; for they are derived entirely from statute, and not from the common law. The commission, in the first place, empowers him to conserve the peace; and thereby gives him all the power of the antient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing criminals (b). It also empowers any two or more of the Justices named therein to hear and determine offences, which is the ground of their criminal jurisdiction at Quarter Sessions (c); of which more will be said hereafter, when we have occasion to treat of crimes and the manner of their prosecution.] Besides the jurisdiction which the Justices of each county at large exercise, in these and other matters, at the Quarter Sessions, authority is moreover given, by various statutes, to the Justices acting for the several divisions, into which counties are for that purpose distributed (d), to transact different descriptions of business, at *special sessions*. By other Acts, two Justices (or in some cases even a single one) are also empowered to try in a summary way, and without jury, such offences as the respective statutes particularise;

(a) Justices of the Peace Act, 1906, s. 4.

(b) Indictable Offences Act, 1848; Summary Jurisdiction Acts, 1848 and 1879.

(c) Quarter Sessions Act, 1842.

(d) Division of Counties Act, 1828; Petty Sessional Divisions Acts, 1836 and 1859.

and the meeting together of Justices, for such and similar purposes, is denominated a Petty Sessions (*a*).

In view of the troublesome nature of the duties imposed upon magistrates, and the honorary character of the office, statutory provisions have been expressly made to protect a magistrate in the upright discharge of his office (*b*); which, among other privileges, entitle him, on being sued for any oversight, to tender amends, and exempt him in general from being sued at all after the expiration of six months from the commission of the injury (*c*). He is also freed from all liability where the matter was one within his jurisdiction; unless it can be proved that he proceeded maliciously and without reasonable and probable cause. Subject to these legislative protections, a Justice of the Peace is, like other Crown officials, liable to an action by the party injured, for illegal acts done under colour of his office (*d*); he is also liable to be prosecuted criminally, by indictment or information, if guilty of any corrupt or malicious abuse in the exercise of his judicial discretion. On the other hand, when he acts fairly and *bonâ fide*, leave will not be granted to file an

(*a*) As to providing places for holding petty sessions, see the Petty Sessions Act, 1849; Petty Sessions and Lock-up House Act, 1868; and Summary Jurisdiction Act, 1884. As to *petty sessional divisions*, see Division of Counties Act, 1828; Petty Sessions Act, 1849. As to clerks of justices and of special and petty sessions, see Justices Clerks Act, 1877.

(*b*) Justices Protection Act, 1848; *Prickett v. Gratrex* (1846) 8 Q. B. 1020; *Leary v. Patrick* (1850) 15 Q. B. 266; *Taylor v. Nesfield* (1854) 3

El. & Bl. 724; *Gelen v. Hall* (1857) 2 H. & N. 379; and Public Authorities Protection Act, 1893.

(*c*) Actions against metropolitan police magistrates were formerly required to be brought within three months (Metropolitan Police Courts Act, 1839, s. 53; *Barnett v. Cox* (1847) 9 Q. B. 617). But, *semble*, they may now be brought within six months (Public Authorities Protection Act, 1893).

(*d*) *Fernley v. Worthington* (1840) 1 Man. & Gr. 491; *Cave v. Mountain*, *ibid.* 257.

information against him, on account of a mere error in his proceedings (*a*).

It is impossible, on the plan of the present work, to enter minutely into the particulars of the accumulated authority from time to time committed to the charge of the Justices of the Peace. As regards administrative matters, the former powers of the Justices have been vested, for the most part, in the County Councils established by the Local Government Act, 1888 ; but the reader will find in the later editions of Dr. Burn's *Justice of the Peace* or Mr. Stone's *Justices' Manual* everything relating to this subject both in antient and modern practice, collected with great care and accuracy. And the authority of the Justices, and of the County Councils respectively, as regards all the miscellaneous subject-matters of their jurisdiction, will be touched upon, more or less, in such subsequent parts of these Commentaries as relate to these several matters.

IV. *Constables*.—[The word *constable* is sometimes said to be derived from the Saxon *koning-staple*, and to signify the support of the King. But as we borrowed the name as well as the office of constable from the French, it seems more satisfactory to deduce it, with Sir Henry Spelman and Dr. Cowell, from that language ; wherein it is plainly derived from the Latin *comes stabuli*, an officer well known in the Empire, and so called because, like the Great Constable of France, as well as the Lord High Constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms, which were performed on horseback (*b*). The office of Lord High Constable hath been long disused in England, except upon great and

(*a*) *R. v. Palmer* (1761) 2 Burr. 1162 ; *R. v. Borron* (1820) 3 B. & Ald. 432.

(*b*) Reeves, *Hist. Eng. Law*, vol. iii. p. 194 ; Hallam, *Med. Ages* (7th ed.), vol. iii. p. 223.

[solemn occasions ; and the constables of whom we now speak are officers of a much humbler character, although they are said to have originally emanated from the office of the Lord High Constable (a).

Constables were formerly of two sorts ; namely, high constables and petty constables. The high constables, who were ordained by the Statute of Winchester (b), were appointed at the courts leet of the franchise or hundred over which they presided ; or, in default of that, by the Justices at their special sessions, as directed by the County Rates Act, 1844 (c). The proper duty of the high constable seems to have been to keep the peace within the hundred (d), as the petty constable did within the parish or township ; for the hundred was formerly answerable for all robberies committed therein by daylight. The high constables were also, by various statutes, charged with other duties, such as serving precepts and warrants on certain occasions.] But, the utility of these officers having become questionable, the justices for each county were directed by the High Constables Act, 1869, to consider and determine, whether it was necessary that the office of high constable of each hundred, or other like district, within their jurisdiction, should be continued ; and, as a matter of fact, high constables have now almost disappeared.

[The petty constables are inferior officers in every town and parish, formerly subordinate to the high constable of the hundred ; and have two offices united in them, the one antient, the other modern. Their antient office was that of headborough, tithing man, or borsholder, officials who are as antient as the time of King Alfred ; and their modern office that of constable merely, which was instituted about the reign of Edward the Third, for the assistance of the

(a) Lambard, *Constables*, 5. (c) S. 8.

(b) 13 Edw. 1 (1285) st. 2, (d) 4 Inst. *ubi sup.*  
c. 6.

[high constable (*a*). The chief duty of petty constables is the preservation of the peace; though they also have other particulars assigned to them by Act of Parliament, notably the service of summonses and execution of warrants, of Justices of the Peace, relative to the apprehension and commitment of offenders.] In the execution of these warrants, the petty constable enjoys certain protections similar to those conferred on the Justices themselves, *e.g.*, an action cannot be brought against him for what he does in his office, after the expiration of six months from the commission of the act (*b*). And by the Constables Protection Act, 1750, neither he, nor those acting in aid of him, may be sued for anything done in obedience to such warrant, unless a demand has been previously made for a perusal and copy of the warrant under which he acted, and the Justice who signed the warrant be made a joint defendant; and on proof of the warrant at the trial, the jury must find for the constable, notwithstanding any defect of jurisdiction in the magistrate (*c*).

Petty constables were formerly chosen by the jury at the court leet; or, if no court leet were held, then by two Justices of the Peace (*d*). But, with the object of improving the character of the force, which had in modern times become very inadequate to the performance of its duties, it was provided, by the Parish Constables Act, 1842 (*e*), that the Justices should annually issue precepts to the overseers of each parish in their county, not being within any borough under

(*a*) Lamb. 9.

(*b*) *Gosden v. Elfick* (1849)  
7 D. & L. 194; Public  
Authorities Protection Act,  
1893.

(*c*) Constables Protection  
Act, 1750, s. 6. Notice before  
action is not now required

(Public Authorities Protection  
Act, 1893).

(*d*) *R. v. Mosley* (1835) 3  
Ad. & El. 488.

(*e*) Amended by the Parish  
Constables Acts, 1844, 1850,  
and 1872.



the Municipal Corporations Act; requiring them to return a list of a competent number of men within such parish qualified and liable to serve as constables (*a*). In this class is included (subject, however, to numerous exceptions,) every able-bodied man there resident, between twenty-five and fifty-five years of age, who is rated to the poor rate or county rate, or is a tenant to the value of 4*l.* per annum. It was further provided, by the same Act, that the Justices, at a special Petty Sessions of the peace to be holden for that purpose, should revise the list, and choose therefrom such number of persons as they should deem necessary, having regard to the extent and population of the parish; but no person who had already served was to be liable to do so again, till every other person liable should have served either in person or by substitute (*b*). It was also provided, that every person so chosen should serve for a year, or until another should be appointed in his stead; and, in case of his refusal to do so, should incur such penalties as in the Act provided. Fees, payable out of the poor rate, are to be allowed to the constables for the service of summonses and the execution of warrants, and for such other occasional services as the Justices may think fit; according to a Table, to be settled at Quarter Sessions, and approved by a Secretary of State. Every constable appointed under the Act is, moreover, to have within his county, and also within all liberties and franchises, and detached parts of other counties situated therein, and also in every adjoining county, all the powers and privileges, and be liable to all the duties and responsibilities, which a constable

(*a*) *R. v. The Overseers of North Bierley* (1858) El. Bl. & El. 519. (As to constables in boroughs, see Municipal Corporations Act, 1882, ss. 190–196; Borough Constables Act, 1883.)  
 (*b*) Parish Constables Act, 1850, s. 4; *R. v. Booth* (1848) 12 Q. B. 884.

before enjoyed, or was subject to, within his own constablewick ; but is not to be bound to act beyond his own parish without the special warrant of a Justice of the Peace. But since the subsequent establishment of an efficient county police has made the statute a dead letter, it has been provided, by the Parish Constables Act, 1872, that no parish constables shall be appointed ; unless for any parish in regard to which the magistrates for the county in Quarter Sessions determine that it is necessary. Paid parish constables may (on a resolution of the parish council, or meeting) still, however, be appointed in any parish not wholly or in part included in a borough.

With regard to incorporated boroughs, which, as above observed, are exempted from the operation of the Parish Constables Act, 1842, a police or constabulary force is maintained in each for the preservation of the peace (*a*). This force is appointed by, and is under the superintendence of, the Watch Committee of the borough (*b*) ; but as regards boroughs, not being county boroughs, which, according to the census of 1881, had a population of less than 10,000, the powers and duties of the Watch Committee have now ceased, and have been transferred to the council of the administrative county which comprises such borough (*c*).

In addition to the parochial and borough police, there is also the county constabulary (*d*), under the superintendence of a *chief constable*, an officer formerly

(*a*) Police Act, 1856, s. 7.

(*b*) See the Municipal Corporations Act, 1882, repealing and re-enacting the provisions in that behalf contained in 5 & 6 Will. 4 (1835) c. 76 ; and (as to the watch rate) 7 Will. 4 & 1 Vict. (1837) c. 81, s. 3 ; 3 & 4 Vict. (1840) c. 28 ; and

County and Borough Police Act, 1859, s. 5.

(*c*) Local Government Act, 1888, s. 39.

(*d*) The establishment of a county police was made compulsory by the Police Act, 1856.

appointed by the Justices of each county, subject to the approval of the Secretary of State for the Home Department, but now, in common with the county police, subject to the standing Joint Committee of the Quarter Sessions and of the County Council (*a*). Under the provisions of the various Acts regulating the subject, the chief constable may, subject to the prescribed approbation, appoint such other constables as may be required, and also a superintendent to be at the head of the constables in each division; and may at his pleasure dismiss any of them, subject to the rules established for the government of the force (*b*).

The same Acts further provide, that the salaries and allowances of the chief and other constables, and all expenses incurred in putting the Acts into execution, shall be paid out of a police rate to be made by the Joint Committee of the County Council and the Quarter Sessions; that it shall be lawful for the Justices of any county, and for the Council of any incorporated borough situated in or adjoining to such county, to agree together for the consolidation of the county and borough police establishments (*c*); and that the Justices of every county, and the Watch Committee, if any, of each borough, or, where none exists, then the County Council, shall annually transmit to the Secretary of State an account of the crime within such county or borough respectively. And in particular, by the County and Borough Police Act, 1856, it was provided, that Her Majesty might appoint *inspectors* to report on the efficiency of the police (*d*); and that, on a certificate of the Secretary of State that the police of any county, or of any borough, with a population

(*a*) Local Government Act, 1888, s. 9.

s. 14; Local Government Act, 1888, ss. 33, 39.

(*b*) County Police Act, 1839, ss. 6, 7.

(*d*) County and Borough Police Act, 1856, ss. 14, 15.

(*c*) County Police Act, 1840,

amounting to five thousand, had been maintained, during the preceding year, in a state of efficiency as to numbers and discipline, a sum, in aid of its expenses, might be granted by the Treasury, not exceeding one-fourth of the charge for its pay and clothing (*a*). Now, however, under the Local Government Act, 1888 (*b*), sums equal to the proceeds of duties on local taxation licences, and four-fifths of one half of the probate duties, are paid out of the Consolidated Fund to the Local Taxation Account created by that Act; and out of those sums certain ascertained proportions are payable to each county council, and to the council of each county borough, in lieu of the grants theretofore made out of the Exchequer in aid of local rates. And the same Act provides (*c*) that the County Council shall, unless the certificate of the efficiency of the police force is withheld, pay over or transfer to the police account of the county, or to the council of each county borough, one half of the costs of the pay and clothing of the police force of the county or county borough respectively.

There are also *special* constables, who are appointed by the magistrates to execute warrants on particular occasions, or to act in aid of the preservation of the peace on special emergencies, where an increase of the existing police force appears desirable (*d*). This office, in the absence of volunteers, is compulsory; the Special Constables Acts, 1831 and 1835, having enacted, that any two Justices, upon due cause shown on the oath of a credible witness, that a tumult or riot has taken place, or may be reasonably apprehended, may, if of opinion that the ordinary officers are insufficient,

(*a*) Ss. 16, 17.

(*c*) S. 24.

(*b*) Ss. 20–22, 34, amended  
by s. 17 of the Finance Act,  
1907.

(*d*) Constables Expenses  
Act, 1801.

appoint and swear in any persons fit for the purpose (who need not be householders, or even residents within the place for which they are to act, but must be such as have no legal exemption or incapacity from or for serving the office of constable) to act as special constables for a limited time, for some particular parish, township, or place. In like manner, the Lord Lieutenant of the county may, by direction of the Secretary of State, cause special constables to be appointed to act, either for the whole county, or in any portion thereof. In either case, any privilege of exemption may, by order of the Secretary of State, be disallowed; and when special constables are appointed under these Acts, they have, in general, all the same powers as an ordinary constable (a).

Another branch of the police of the realm, closely connected with the subject under discussion, consists of *watchmen*, or guardians of the peace by night. These were formerly only the deputies or assistants of the constable, and were appointed by him; but, in modern times, they have been appointed without the constable's intervention, being employed and paid by particular parishes, or sometimes by private individuals, with the view of obtaining (under special circumstances or on particular occasions) a more effectual protection to person and property than can be otherwise afforded. The authority of watchmen, in this modern sense, is recognised by law (b);—*e.g.*, by the Lighting and Watching Act, 1833, regulations were made for the watching and lighting of any parish desirous of adopting the provisions of the Act at its

(a) Special Constables Acts, (1835) c. 76, s. 83, repealed 1831, s. 13, and 1838; *R. v. Hamilton* (1868) L. R. 3 Q. B. 718; *R. v. Lord Newborough* (1869) *ibid.* 4 Q. B. 585; and (as to special constables in boroughs) see 5 & 6 Will. 4  
(1835) c. 76, s. 83, repealed and re-enacted by the Municipal Corporations Act, 1882, s. 196.  
(b) 2 Hale, P. C. 98; 3 Inst. 52; *Mackalley's Case* (1612) 9 Rep. 66.

own expense (a). Yet, since it is not intended that a body of watchmen thus established shall remain as a separate force, in addition to the county constabulary, where this latter body is sufficient for the protection of the public, the County Police Act, 1840 (b), provides that they are, as a separate force, to be discontinued on its being notified to their inspector by the chief constable of the county, that he is ready to take the charge of the place upon himself ; but where the population of the place amounts to fifteen thousand, the previous authority of a Secretary of State is required for the discontinuance (c).

Finally, it may be mentioned, that, by a long series of statutes, commencing with the year 1829, a numerous and well equipped police force, under the control of a Chief Commissioner appointed by the Crown, has been instituted and maintained for the metropolitan area, outside the ancient boundaries of the City ; and that, in the City itself, there is also a force of City police, under the control of the Common Council, subject to the supervision in certain respects of the Court of Aldermen and the Home Secretary (d).

(a) *Pilkington v. Riley*  
(1849) 6 D. & L. 628 ; *R. v.*  
*Deverell* (1854) 3 El. & Bl.  
372 ; *R. v. Overseers of Kings-*  
*winford*, *ibid.* 688.

(b) S. 20.  
(c) County and Borough  
Police Act, 1856, s. 19.  
(d) 2 & 3 Vict. (1839) c. xciv.

## BOOK IV.

### OF PUBLIC RIGHTS—(*continued*).

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#### PART II.

#### OF THE CHURCH OF ENGLAND AND NON-CONFORMIST CHURCHES.

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HAVING now finished our examination of the division of public rights which concerns the *civil* authority, and the relations between persons who are subject to that authority, we are next to turn our attention to the division of public rights which concerns matters *ecclesiastical*. First we will deal with the Church of England ; and then, subsequently, with the Nonconformist Churches.

The Church of England, on its legal side, may be defined as an institution established by the law of the land for the maintenance of religion ; and in treating of it, we shall find it convenient to consider—

First, THE OFFICERS OF THE CHURCH ;  
Secondly, THE LAW RELATING TO THE DOCTRINE,  
WORSHIP, AND DISCIPLINE OF THE CHURCH ;  
Thirdly, THE LAW RELATING TO ITS ANCIENT  
BENEFICES AND ENDOWMENTS ; AND,  
Fourthly, THE EXTENSIONS WHICH HAVE FROM  
TIME TO TIME BEEN EFFECTED UNDER COM-  
PARATIVELY RECENT ACTS OF PARLIAMENT.

And, first, of the OFFICERS of the Church.

## CHAPTER I.

## OF THE OFFICERS OF THE CHURCH OF ENGLAND.

THE CLERGY and the LAITY together constitute the Church. The clergy, as distinguished from the laity, are those set apart to superintend the public worship of Almighty God (including the celebration of the sacraments and of other the ceremonies of religion), and to administer spiritual counsel and instruction. They consist of such, and such only, as have been admitted into *holy orders*; that is to say, bishops (including archbishops), priests, and deacons (*a*). By the Clergy Ordination Act, 1804, it is provided (in accordance with the canons and the preface to the form of ordination in the Book of Common Prayer), that none shall be ordained deacon under twenty-three years, nor priest under twenty-four years of age; though the Archbishop of Canterbury has the privilege of admitting deacons, but not priests, by faculty or dispensation, at an earlier age. By the 13 Eliz. (1571) c. 12, and canons of 1603, it was prescribed, that none should be ordained either priest or deacon, without first subscribing the Thirty-nine Articles of Religion; but in lieu of this, it has now been provided by the

(*a*) "Bishops, Priests, and  
"Deacons are the ministerial orders known to the  
"episcopal establishment of  
"England. In the *Bishop*,  
"lies the power of ordination. . . . *Deacons*, when  
"ordained, may, licensed by  
"the bishop, preach and  
"administer the rite of

"baptism. *Priests*, by this  
"ceremony, are further  
"empowered to administer  
"the Lord's Supper, and to  
"hold a benefice with cure  
"of souls."—*Report on the Religious Worship of England and Wales*, Dec. 1853, pp. xxxiv–vi.



Clerical Subscription Act, 1865, and canons of the same year, that before ordination the priest or deacon shall make and subscribe a declaration of assent to the Thirty-nine Articles, the Book of Common Prayer, and the Form of Ordination ; with the addition of (i.) an assertion of belief, that the doctrine of the Church of England as therein set forth is agreeable to the Word of God, and (ii.) a pledge to use, in public prayer and administration of the sacraments, the forms in the Book of Common Prayer prescribed “and none other, except “so far as shall be ordered by lawful authority” (*a*). It is also requisite that the candidate shall, prior to ordination, take the oath of allegiance to the King (*b*), and the oath of canonical obedience to his bishop (*c*). Moreover, by the canon law, no person may be admitted into holy orders without a *title* ; that is to say, he must produce to the bishop a presentation to some ecclesiastical living within the diocese, or a certificate that he is provided with a church or a place as minister then vacant. It will be sufficient, however, if he be a fellow or chaplain in Oxford or Cambridge, or master of arts of five years’ standing in either of such universities, and living there at his own charge ; or if the bishop himself intends shortly to admit him to some benefice or curacy. If the bishop ordains a man without a proper title, he is liable himself to maintain him (*d*).

The Church of England recognises the episcopal orders of the following other churches, viz., the Church of Ireland, the Scottish and American Episcopal, and the Greek and Roman Churches, and probably also the Armenian and other Eastern Churches, the Swedish

(*a*) Clerical Subscription Act, 1865, ss. 1, 4.

(*b*) The form of oath is now that prescribed by the Promissory Oaths Act, 1868, s. 2.

(*c*) Clerical Subscription Act, 1865, s. 12 ; Promissory Oaths Act, 1868, s. 14.

(*d*) Can. 33 of 1603 ; Wats. *Clerg. Law* (4th ed.) 147.

Church, and the Old Catholics. But by the Colonial Clergy Act, 1874, a person ordained priest or deacon by a bishop other than a bishop of a diocese in the Churches of England or Ireland, or a bishop lawfully acting for him, may not officiate as such in England unless either (i.) he has written permission from one of the English Archbishops, and has subscribed a declaration similar to that contained in the Clerical Subscription Act, 1865, or (ii.) he holds or has previously held preferment or a curacy in England. The consent of the bishop of the diocese is also necessary (a); and any appointments made contrary to the Act are void (b). But the Act does not affect persons ordained by a Scottish bishop; who, by the Episcopal Church (Scotland) Act, 1864, may officiate in England with the consent of the bishop of the diocese.

In order to enable them to attend the more closely to their duties, the clergy of the Established Church have certain privileges and exemptions. A clergyman cannot be compelled to serve on a jury; nor can he be chosen to any temporal office, as bailiff, reeve, constable, or the like (c); during his attendance on divine service he is privileged from being arrested in any civil suit; and the glebe and tithes of his parsonage are not liable to be seized in execution to satisfy a judgment in the same manner as lay property, but instead are made liable to a *sequestration* (d). Upon a sequestration, a writ of *feri facias de bonis ecclesiasticis* is directed to the bishop, to levy the amount of the judgment debt out of the clergyman's ecclesiastical property; and the bishop appoints a sequestrator. Under the Sequestration Act, 1871, the bishop may,

(a) Colonial Clergy Act, 'Ecclesiastical Law' vol. xi. 1874, s. 4. pp. 616, 617; *Arbuckle v. Cowtan* (1803) 3 Bos. & Pul.

(b) *Ibid.* s. 6. 321; *Powell v. Hibbert* (1850) 15 Q. B. 129.

(c) Finch, *Common Law* (ed. 1759) 388.

(d) *Laws of England* (tit,

on a sequestration, after six months, appoint one or more curates to the benefice, and assign them stipends in proportion to the population ; which stipends the sequestrator must pay in priority to any other claim. The bishop may also, in his discretion, inhibit the incumbent from performing any service in the church while the sequestration remains in force. Upon the bankruptcy of a beneficed clerk, the profits of his benefice are sequestered in like manner (a) ; but in every case, due provision must be made for the service of the church. Since the passing of the 2 & 3 Edw. 6 (1548) c. 21, it has been lawful for the English clergy to marry.

As the clergy have their privileges, so also they have their disabilities. They are made incapable, by the House of Commons (Clergy Disqualification) Act, 1801, of being elected members of the House of Commons ; and by the Municipal Corporations Act, 1882 (b), of being councillors or aldermen in boroughs (other than metropolitan boroughs, in which, as in counties, their election is permitted (c)). They are also prohibited from farming or trading ; for, by the Pluralities Act, 1838 (d), no spiritual person holding any cathedral preferment or benefice, or any curacy or lectureship, may take to farm for occupation by himself any lands exceeding eighty acres in the whole, without permission in writing from the bishop of the diocese ; nor may such spiritual person, by himself or any other to his use, carry on any trade or dealing for profit, unless it be conducted by more than six partners, or unless his share in it has devolved upon him by inheritance, or other like representative title. And, even in these excepted cases, it is illegal for him to act as director

(a) Bankruptcy Act, 1883, s. 52. 1888, s. 2 ; London Government Act, 1899, s. 2 (4).

(b) S. 12.

(d) Pluralities Act, 1838,

(c) Local Government Act, ss. 28-31.

or managing partner, or to carry on the trade in person (*a*). Notwithstanding these prohibitions, a contract made by any spiritual person is, in general, enforceable against him (*b*) ; and the Act allows him to carry on the business of a schoolmaster, to deal with booksellers as to the sale of books, to be a managing director, partner, or shareholder in any benefit, fire insurance, or life insurance society, to buy or sell to the extent necessarily incidental to his lawful occupation of glebe and other land, and to sell minerals, the produce of his land, provided always that such buying or selling be not personally conducted by him in any market or place of public sale (*c*).

The divers officers of the Church, as recognised by the law of England, are the following, namely :—archbishops and bishops ; deans and canons ; archdeacons and rural deans ; rectors, vicars, and curates ; churchwardens, parish clerks, and sextons.

I. Both ARCHBISHOPS and BISHOPS are constituted by election, confirmation, consecration and installation ; though an archbishop is more properly said to be *enthroned* and not installed (*d*). [Their election is by the chapter of the cathedral church, but only in virtue of a licence from the Crown ; for although, in very early times, election proper, *per clerum et populum*, was the usual mode of elevation to the episcopal chair (*e*), yet the right of appointing to the bishoprics, already in pre-Norman times, was in effect in the Crown (*f*), the investiture, which was originally *per annulum et*

(*a*) Pluralities Act, 1838, s. 29 ; and Trading Partnership Act, 1841.

(*b*) *Lewis v. Bright* (1855) 4 El. & Bl. 917.

(*c*) S. 30.

(*d*) *Bishop of St. David's v. Lucy* (1699) 1 Salk. 134 ; 3 Salk. 72.

(*e*) *Bishop of Ossory's Case* (1620) Palmer's Rep. 22 ; *Sobrean v. Kevan* (1620) 2 Rolle Rep. 101 ; M. Paris, A.D. 1095, p. 19.

(*f*) *Bishop of Ossory's Case* (1620) Palmer's Rep. at p. 28 ; Selden, *Jan. Angl. lib.* 1, s. 39.

[*baculum*, and subsequently *per sceptrum* (a), operating as a complete donation.

Subsequently, however, King John, in order to obtain the protection of the pope against his discontented barons, was prevailed upon to give up, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops; and he reserved only the custody of the temporalities during the vacancy, the form of granting a licence to elect (on refusal whereof the electors might proceed without it), and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause (b). But, by the Act of Annates, in 1534 (c), the right of nomination, as it exists at the present day, was restored to and re-vested in the Crown. For by that statute, it is enacted, that on any future avoidance of an archbishopric or bishopric, the King may send to the dean and chapter his usual licence (called his *congé d'élire*) to proceed to election; which is always to be accompanied with a letter missive from the King, containing the name of the person whom he would have them elect. And if the dean and chapter delay their election above twelve days, the nomination shall devolve to the King, who may then by letters patent appoint such person as he pleases. This *congé d'élire* issues also in the case of the bishoprics created by Henry the Eighth himself, viz., Chester, Gloucester, Peterborough, Bristol, and Oxford (d); although these are in a sense donative, that is, in the gift of the Crown (e). But, in the case

(a) Decret. 2, caus. 16, qu. 7, cap. 12, 13; Encyclop. Brit. sub tit. *Investiture*.

(b) M. Paris, A.D. 1214, p. 247; 1 Rym. *Fæd.* 198; Magna Carta, c. 1; 25 Edw. 3 (1352) st. 6, c. 3.

(c) 25 Hen. 8, c. 20;

revived by 1 Eliz. (1558) c. 1, s. 7 (the Act of Supremacy).

(d) *R. v. Archbishop of Canterbury* (1848) 11 Q. B., at p. 513.

(e) Co. Litt. 134 a (Harg. n. (4)).

[of a new bishopric founded under the provisions of the Bishops Act, 1878 (*a*), the Crown will appoint the bishop by letters patent; so long as there is not a dean and chapter constituted.]

This election or nomination, if it be of a bishop, must be signified by the King's letters patent to the archbishop of the province; and if it be of an archbishop, to the other archbishop and two bishops, or to four bishops. In either case, it requires them to confirm, invest, and consecrate the person so elected, which they are bound forthwith to perform (*b*); after which, the bishop elect sues to the King for his temporalities, making oath to the King and none other, and takes restitution of his secular possessions out of the King's hands only. And if the dean and chapter do not elect in the manner by the Act appointed, or if the archbishop or bishop refuse to confirm, invest, and consecrate the bishop elect, they incur the penalties of a *præmunire*; that is to say, the loss of all civil rights, with forfeiture of lands, goods, and chattels, and imprisonment during the royal pleasure (*c*).]

There are two *archbishops* for England and Wales (*d*); that is to say, (1) the Archbishop of Can-

(*a*) S. 6. (See also Bishops of Southwark and Birmingham Act, 1904; Sheffield, Chelmsford, and Suffolk Act, 1913.)

(*b*) *R. v. Archbishop of Canterbury* [1902] 2 K. B. 503. A bishop, when consecrated, must be full thirty years of age (see the preface to the form of ordination in the Book of Common Prayer); but anciently there seems to have been no such restriction. (See Godw. *De Præsul. Angliæ* 693.)

(*c*) 25 Hen. 8 (1534) c. 20, s. 7.

(*d*) At one time the bishop of Caerleon in Wales was virtually, though not in name, a third archbishop; but in the time of Henry the First, both that see and all Wales became subject to the Archbishop of Canterbury. (Rogers, *Eccl. Law*, 2nd ed. 98.) In the eighth century there was also for a short time an Archbishop of Lichfield.

terbury, who has within his province all the dioceses, except those of Durham, Carlisle, Chester, Liverpool, Manchester, Newcastle, Ripon, Sheffield, Sodor and Man, Wakefield, and York ; and (2) the Archbishop of York, whose province comprises the eleven dioceses just named. [An archbishop is, indeed, the chief of all the clergy in his province ; and has the inspection of the bishops of that province as well as of the inferior clergy, or (as the law expresses it) the power to *visit* them (a). Therefore, he confirms the election of the bishops, and afterwards consecrates them (b). Upon receipt of the King's writ, he calls the bishops and clergy of his province to meet him in convocation ; but, without the King's writ, he cannot assemble them (c). To him, all appeals in ecclesiastical matters are made from the inferior ecclesiastical jurisdictions within his province ; and as complaint lies against a bishop to him in person (d), so also an appeal lies from the consistory courts of each diocese to the archiepiscopal court (e). During the vacancy of any

(a) *Bishop of St. David's v. Lucy* (1699) 1 Salk. 134. Bishops are styled *suffragan*, in respect of their relation to the archbishop of their province. But at one time bishops also had their *suffragans* to assist them in conferring orders, and in other spiritual offices within their diocese ; and, after having for a long period remained in abeyance, these *suffragan* bishops have recently been again brought into use in many of the dioceses. Such *suffragan* bishops must not be confounded with the *coadjutors* of bishops ; the latter being appointed (in the case of a bishop's infirmity) to

superintend his *jurisdiction* and *temporalities*, neither of which is within the interference of a *suffragan* (Gibs. *Cod.* 137 ; Co. Litt. 94 a (Harg. n. (3)) ; Bishops Resignation Act, 1869, ss. 3-5). As to the election and consecration of *suffragan* bishops, see 26 Hen. 8 (1534) c. 14, amended by the *Suffragans Nomination Act*, 1888, and by the *Suffragan Bishops Act*, 1898.

(b) *R. v. Archbishop of Canterbury* (1848) 11 Q. B. 483.

(c) 4 Inst. 322, 323.

(d) *Read v. Bishop of Lincoln* (1889) 14 P. D. 88.

(e) 24 Hen. 8 (1532) c. 12 ; Gibs. *Cod.* 1035, 1036 ; *Ex*

[see in his province, the archbishop is guardian of the spiritualities thereof, as the King is of the temporalities; and he executes all ecclesiastical jurisdiction therein. But if an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of Prior of Canterbury was abolished at the Reformation (a). The archbishop is entitled to present, by lapse, to any ecclesiastical living in the disposal of one of his diocesan bishops, if not filled within six months; and he has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such bishop, in lieu of which, the bishop used to make over by deed to the archbishop, the next presentation of such dignity or benefice in the bishop's disposal, within the see, as the archbishop himself should choose. This presentation was, therefore, called his *option*; and was binding on the bishop himself alone who granted the option, and not on his successors (b).

It is also the privilege of the Archbishop of Canterbury to crown the Kings and Queens of this kingdom (c); and he has also, by the statute 25 Hen. 8 (1534), c. 21, the power of granting dispensations

*parte Denison* (1854) 4 El. & Bl. 292; *R. v. Tristram* [1902] 1 K. B. 816; and see *post*, Bk. V. ch. xii. (vol. iii. pp. 531, 532).

(a) 2 Roll. Abr. 223.

(b) The King, in imitation of the German Emperor, exercised (or claimed to exercise) the right of naming to the first prebend that became vacant after his accession, and this prerogative probably gave rise to *corodies*, viz., the right (now disused) of the King to send one of the royal chaplains to be maintained

by the bishop, or to have a pension allowed him till the bishop promoted him to a benefice (Brev. 11 Edw. 1; 3 Pryn. *Ex. Chron. Vind.* 1264).

(c) It is said, that the Archbishop of York has the privilege of crowning the Queen Consort, and also of being her perpetual chaplain. (1 Burn, *Eccl. Law*, 197.) At the coronation of King Edw. 7 this privilege of the Archbishop of York was allowed; but not as of right. It was not allowed at that of King Geo. 5.



[in any case, not contrary to the Holy Scriptures or to the law of God, where the pope used formerly to grant them (a). This is the foundation of his power to grant special licences to marry at any place or time (b), and to give dispensations to hold two livings (c), and the like ; and on this also is founded the right he exercises of conferring degrees (called Lambeth degrees), which are quite distinct from degrees given by the universities (d).]

A *bishop* is the chief of the clergy within his diocese, being subordinate to the archbishop of the province, to whom indeed he is sworn to pay due obedience (e) ; and his dignity is usually called a ' see ' (*sedes*), and the church of his diocese a ' cathedral ' (f). A collegiate church, which is a church consisting of a body corporate of dean and canons, such as Westminster or Windsor, differs from a cathedral in that it is not the church of a bishop (g).

[Among the principal powers which the bishop exercises are those of ordaining priests and deacons, whether for England and Wales or (in the case of the archbishops or the Bishop of London) for the colonies or

(a) See also 28 Hen. 8 (1536) c. 16 ; *Colt v. Bishop of Coventry and Lichfield* (1613) Hob. 140.

(b) Marriage Act, 1823, s. 20.

(c) Pluralities Act, 1838, s. 6 ; see *post*, p. 783.

(d) *Bishop of Chester's Case*, 4 Oxoniana [A.D. 1721] p. 234.

(e) A clergyman owes canonical obedience to the bishop who ordained him, to the bishop in whose diocese he is beneficed, and also to the metropolitan of such bishop ; so that to kill any of these

was petit treason (1 Hale, P. C. 381).

(f) 1 Burn, *Eccl. Law*, 275 c, 276 b.

(g) Ecclesiastical Commissioners Acts, 1840 and 1841 ; Cathedrals Act, 1864. There are thirteen *cathedrals of the old foundation*, eight *conventual cathedrals* constituted with a *new foundation* of deans and chapters by Hen. 8, five cathedrals *founded*, with new bishoprics, by Hen. 8 ; besides the modern cathedrals of Ripon, Manchester, Southwell, Truro, &c.

[foreign countries (*a*), consecrating churches, and inspecting the manners of the clergy (*b*) ; for which purpose, he may 'visit' at pleasure every part of his diocese. It is likewise part of his business to institute and direct induction to all livings in his diocese, to license to perpetual curacies, and to license temporary curates within the diocese, and to regulate their salaries (*c*). In addition to these functions, the bishop is also an ecclesiastical judge ; but his chancellor (who must be at least a bachelor of law or a master of arts) is appointed to hold his consistory courts for him, and to assist him in matters of ecclesiastical law (*d*).] If, however, the bishop's commission to his chancellor requires the consent of the bishop for the hearing in any particular case, prohibition will issue if that consent is not first obtained (*e*).

In case of complaint against a clerk in holy orders, for any ecclesiastical offence against morality (*f*) (not being a mere question of doctrine or of ritual), proceedings must be taken under the Clergy Discipline Act, 1892, which supersedes, as regards such offences, the provisions of the Church Discipline Act, 1840. By the Act of 1892 (*g*), the offender may be prosecuted in the consistory court of the diocese in which he holds preferment, or is licensed or resides (*h*), and at the suit either of any of his parishioners, or of the bishop, or any one approved by him (*i*). The bishop has a dis-

(*a*) Ordination of Aliens Act, 1784 ; Ordinations for Colonies Act, 1819.

(*b*) *Re Dean of York* (1841) 2 Q. B. 1.

(*c*) See *post*, pp. 776–779.

(*d*) Can. 127 of 1603 ; Godolph. *Repert.* 80 ; Ayl. *Parerg.* 160.

(*e*) *R. v. Tristram* [1902] 1 K. B. 816.

(*f*) *Bishop of Rochester v.*

*Harris* [1893] P. 137 ; *Sweet v. Young* [1902] P. 37.

(*g*) Ss. 2–10.

(*h*) *Lee v. Flack* [1896] P. 138.

(*i*) When the bishop was the patron of the preferment held by the clerk proceeded against, the *archbishop* used to act (*Ex parte Denison* (1854) 4 El. & Bl. 292 ; *R. v. Archbishop of Canterbury*

cretion to veto the prosecution in any case in which he thinks the complaint to be either vague or frivolous (*a*); but if the prosecution proceeds, then, for the decision of any question of fact that may be in dispute, five assessors are to assist at the trial, where either party so requires. For the decision of the question of fact, the assessors must be unanimous; or else the chancellor of the court and a majority of the assessors must agree upon it. The chancellor presides at the trial; and all questions of law are determined by him. Either party, on a matter of law, and the accused, by leave, on a question of fact, may appeal either to the provincial court or to the King in Council. A complaint may be made within two years after conviction by a temporal court for an offence, but otherwise must be made within five years from the date of the offence. If the alleged offence is substantiated, the sentence may suspend the clerk from performing divine service, and from enjoying the profits and emoluments of the living, for a specified number of years (*b*); or may absolutely deprive him. And if the sentence be one of deprivation, the offender\*, unless freely pardoned by the Crown, is incapable of holding any preferment, except such as the bishop and archbishop (after public notice) allow him to hold. If he holds no preferment, the sentence may declare him incapable of holding preferment. He

(1856) 6 El. & Bl. 546); but the bishop is now expressly made competent in such a case to act (s. 10 (3)).

(*a*) Act of 1892, s. 2 (*a*). Under the Church Discipline Act, 1840, the bishop has a discretion as to issuing a commission or not; but acceptance of the *letters of request*, sending the complaint to the provincial court, is not

optional. (See *R. v. Bishop of Chichester* (1859) 2 El. & Bl. 209; *Sheppard v. Phillimore and Bennett* (1869) L. R. 2 P. C. 450.)

(*b*) The profits of the living during suspension belong to the bishop, subject to his making due provision for the services. (*In re Thakeham Sequestration Moneys* (1871) L. R. 12 Eq. 494.)

may further be deposed from holy orders by the bishop, subject to appeal to the archbishop (*a*).

If, under the Benefices Act, 1898 (*b*), the bishop refuses to institute a clergyman to a living on account of grave ecclesiastical misconduct or of evil living, the validity of the refusal may be determined by the archbishop and a judge, who together constitute a court of appeal for this purpose.

As regards offences against ceremonial, ritual, and the like, by the Public Worship Regulation Act, 1874, the Archbishops of Canterbury and York were to appoint, subject to the approval of the Crown, a judge of the Provincial Courts, who must be a barrister of ten years' standing, or one who has been a judge of the superior courts, and in either case a member of the Church of England; and, on a vacancy occurring in the offices of official Principal of the Arches Court of Canterbury and of the Chancery Court of York, the judge was to become the holder of both these offices (*c*). The Act requires such judge to entertain and determine complaints in regard to alterations in the fabric or ornaments or furniture of any church, or in respect of the burial ground, or of the manner in which the ritual prescribed by the Book of Common Prayer is observed. A complaint is tried whenever the bishop of the diocese transmits to the archbishop, for the decision of the judge, a 'representation' as to the matter complained of, which he has received from the archdeacon, or churchwardens, or any three parishioners, or (in the case of a cathedral or collegiate church) any three inhabitants of the diocese, being male persons of full age (*d*). But the bishop only transmits such represen-

(*a*) *Reg. v. Bishop of Durham* [1897] 2 Q. B. 414.

(*b*) S. 2.

(*c*) Lord Penzance accordingly held, and Sir L. T.

Dibdin now holds, the three offices together.

(*d*) *Hudson v. Tooth* (1877) 3 Q. B. D. 46; *Ex parte Green* (1881) L. R. 6 App. Ca. 657;

tation if, after considering the whole circumstances, he is of opinion that proceedings should be taken upon it (a), and if the parties are not willing to submit, without appeal, to the bishop's own decision in the matter. There is also concurrent jurisdiction to try offences as to doctrine, ritual, and the like, under the Church Discipline Act, 1840 (b).

[Archbishoprics and bishoprics may become void by deprivation, for any very gross and notorious crime, and also by resignation; and as all resignations must be made to some superior, a bishop resigns to his metropolitan, and the archbishop to the Crown (c).] Under the provisions of the Bishops Resignation Act, 1869 (d), an archbishop or bishop may resign on the ground of age or mental or permanent physical infirmity, and receive a retiring income charged upon the episcopal revenues; or the dean and chapter may elect a bishop coadjutor in aid of the bishop in such a case.

The claims of the Crown on archbishoprics and bishoprics in respect of the custody of the temporalities, and in respect of the first-fruits and tenths of all spiritual preferments, have been already noticed, and need not, therefore, be again discussed (e); but we may mention here, that the Crown was at one time entitled on the death of a bishop to divers perquisites in the nature of a mortuary (or fine on death) (f), and

*Dean v. Green* (1882) 8 P. D. 79; *Enraght v. Penzance* (1882) L. R. 7 App. Ca. 240.

(a) *Allcroft v. Bishop of London* [1891] A. C. 666.

(b) *Simpson v. Flamank* (1867) L. R. 1 P. C. 463; *Rugg v. Bishop of Winchester* (1868) L. R. 2 P. C. 223; *Martin v. Mackonochie* (1883) 8 P. D. 191.

(c) *Gibs. Cod.* 822.

(d) Made perpetual by 38

& 39 Vict. (1875) c. 19.

(e) See *ante*, pp. 637–640.

(f) The mortuary (or fine on death) comprised six things, viz., the bishop's best horse or palfrey, with his furniture; his cloak or gown, and tippet; his cup and cover; his bason and cover; his gold ring; and, lastly, his *muta canum*, i.e., his mew or kennel of hounds. (See 2 Inst. 491; 2 Bl. Com. 426;

that, when the Crown appoints any spiritual person to an English bishopric, the preferments of which he was before possessed become, in general, void upon his consecration, and the Crown may present to them by prerogative (*a*). But this prerogative does not extend to appointments to colonial bishoprics (*b*), or bishoprics created under the Bishops in Foreign Countries Act, 1841.

II. [A DEAN and CHAPTER are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see (*c*); and the bishop is the immediate superior and ordinary of the dean and chapter, and exercises over them the power of visitation (*d*). The chapter, as distinct from the dean, consists of certain dignitaries called canons; and those of them who hold prebends are also called prebendaries (*e*). They are sometimes appointed by the Crown, sometimes by the bishop, and sometimes by co-optation (*f*). At one period, the dean was elected by the chapter, on a *congé d'élire* from the Crown, in the same manner as bishops; but in those deaneries which were founded by Henry the Eighth, out of the spoils of the dissolved monasteries, the title has always been donative, and the installation merely by letters patent from the Crown (*g*).] And this is now the course with respect to the antient deaneries also; it having been provided by the Ecclesiastical Commissioners Act, 1840, that, from the date of that

*Mirehouse v. Rennell* (1832) 73 a; Co. Litt. 103 a, 300 b, 8 Bing. at p. 497.) 301 a.

(*a*) *Basset v. Gee* (1600) Cro. Eliz. 790; *Grocers' Company v. Archbishop of Canterbury* (1771) 2 Wm. Bl. 770. (*d*) *Re Dean of York* (1841) 2 Q. B. 1.

(*b*) *R. v. Eton College* (1857) 8 El. & Bl. 610. (*e*) Ecclesiastical Commissioners Act, 1840, s. 1.

(*c*) *Dean and Chapter of Norwich's Case* (1598) 3 Rep. (*f*) *Ibid.* ss. 24–26; and Act of 1841.

(*g*) Co. Litt. 95 a.

Act, every deanery (except in Wales) should be in the direct patronage of Her Majesty (*a*). By the same Act it was also provided, that no person should thereafter be capable of receiving the appointment of dean, archdeacon, or canon, until he should have been six years complete in priest's orders, except in the case of a canonry annexed to a professorship, headship, or other office in some university (*b*); and further, that every dean should reside for at least eight months in the year, and every canon for at least three months in the year (*c*), that the right of nominating a regulated number of *minor* canons, with salaries, should in future be in all cases vested in the chapters (*d*), and that *honorary* canons, without salaries, should be appointed for every cathedral church in which there were not already founded any non-residentiary prebends, dignities, and offices. These honorary canonries are in the gift of the archbishops and bishops respectively (*e*). Since this Act, non-residentiary prebendaries have ceased to be members of the chapter (*f*).

Deaneries and canonries may become void by deprivation; or by resignation either to the King or to the bishop (*g*). Under the provisions of the Deans and Canons Resignation Act, 1872 (*h*), a dean or canon may resign on the ground of age or infirmity, and receive a pension, not exceeding one-third of the income of his preferment, charged upon the preferment.

III. [AN ARCHDEACON hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, either

(*a*) Ecclesiastical Commissioners Act, 1840, s. 24.

(*b*) *Ibid.* s. 27.

(*c*) *Ibid.* s. 3.

(*d*) *Ibid.* s. 45.

(*e*) *Ibid.* s. 23.

(*f*) *Randolph v. Milman* (1866) L. R. 2 C. P. 60.

(*g*) *Grendon v. Bishop of Lincoln* (1576) Plowd. at p. 498.

(*h*) S. 3.

[throughout the whole of the diocese or in some particular part of it. He is usually appointed by the bishop himself ; and has a kind of episcopal authority, originally derived from the bishop, but now independent and distinct (*a*). He, therefore, ‘visits’ the clergy ; and he has his separate court for the punishment of offenders by spiritual censures, and for hearing other causes of ecclesiastical cognisance.] All archdeacons throughout England and Wales now exercise full and equal jurisdiction within their respective archdeaconries (*b*) ; and, as a general rule, the jurisdictions of the archdeacon and the bishop are concurrent, so that a suit may be commenced in the court of either (*c*).

IV. [The RURAL DEANS are very antient officers of the church (*d*), whose functions at one time threatened to go out of use ; but rural deaneries still subsist as an ecclesiastical division of the diocese, or of the archdeaconry (*e*),] and of late years the office has somewhat revived in importance. [They seem originally to have been deputies of the bishop, planted all over his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and report dilapidations, and to examine the candidates for confirmation ; and they were armed, in minuter matters, with an inferior degree of judicial and coercive authority (*f*).

(*a*) 1 Burn, *Eccl. Law*, 93–97.

(*b*) Ecclesiastical Commissioners Act, 1836, s. 19.

(*c*) Rogers, *Eccl. Law* (2nd ed.) 59. But as to an appeal from the archdeacon to the bishop, see Gibs. *Cod.* 1036, n. (*f*).

(*d*) Kennett, *Par. Antiq.* 633 ; Dansey, *Horæ Decanice Rurales*.

(*e*) Ecclesiastical Commissioners Acts, 1836 and 1840 (s. 32) ; Archdeaconries and Rural Deaneries Act, 1874.

(*f*) Gibs. *Cod.* 971, 972, 1550.



[V. The next (and indeed the most numerous) class of ecclesiastical persons are the RECTORS and VICARS of churches.

1. The rector of a church is also properly called a parson (*persona ecclesiæ*); that is, one that hath full possession of all the rights of a parochial church. He is called *parson*, because by his person the church, which is an invisible body, is represented; and this appellation is the most legal, most beneficial, and most honourable title that a parish priest can enjoy, because such a one (Sir Edward Coke observes), and he only, is said *vicem seu personam ecclesiæ gerere* (a). The freehold of the parsonage house, the glebe, the tithes, and other dues, all vest, during his life, in the parson. But here we must explain the doctrine of appropriations, and the consequent distinction between rectors and vicars.

At the first establishment of parochial clergy the tithes of the parish were, in some places, at any rate on the Continent, distributed in a fourfold division—one for the use of the bishop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incumbent. But when the sees of the bishops became otherwise amply endowed, they were deprived of their share of these tithes, which then became tripartite (b); and when any

(a) Co. Litt. 300 b. The proper term for a parson in full possession of his living is, in law, *persona impersonata*, or 'parson imparsonée' (*Ibid.*).

(b) According to Lord Selborne, the tripartite division, like the quadripartite, was a local custom, and was not due to the bishops being otherwise endowed; and neither of these divisions ever existed in

England (*Ancient Facts and Fictions concerning Churches and Tithes*, pp. 32, 105). In non-appropriated benefices, rectors appear to have acquired the whole of the tithes by grant from the owners of the land; but land-owners frequently granted the tithes to monasteries, so making them appropriators (*Seld. Tythes*, ch. xi. 1).

[advowsons were subsequently acquired by the monasteries, they *appropriated* to the use of their own corporations the benefices so acquired, together with all the endowments thereof, save only a small part, which they deemed sufficient for the officiating priest (*a*). And upon such an appropriation the appropriators and their successors became the rectors, or perpetual parsons, of the church; so as to sue and be sued in all matters concerning the rights of the church, by the name of parsons (*b*). And when, by the Acts of 1535 and 1539, the monasteries were dissolved, the appropriations which belonged to them respectively, amounting (it has been said) to more than one-third of all the parishes in England, were given to the King in as ample a manner as the appropriators held the same at the time of their dissolution; and many of the appropriations so vested in the Crown being afterwards from time to time granted out by the Crown to subjects, are now in the hands of lay persons, who are usually styled, by way of distinction, *lay impropriators*, though the term ‘appropriators’ is, in strictness, as applicable to these as to the former holders (*c*).

Appropriations, whether spiritual or lay, are capable of being severed, so that the church may become disappropriate. For if the appropriator presents a clerk, who is instituted and inducted to the *rectory*, that incumbent so instituted and inducted is to all intents and purposes a complete parson; and the appropriation, being once severed, can never be reunited again, unless by a repetition of the same solemnities (*d*).]

(*a*) *Grendon v. Bishop of Lincoln* (1576) Plowd. 496–500; *Second Report of Royal Commission on Local Taxation*, 1899, pp. 7; 8.

(*b*) *Wright v. Gerrard* (1618) Hob. 306.

(*c*) 27 Hen. 8 (1535) c. 28; 31 Hen. 8 (1539) c. 13; 1 Burn, *Ecc. Law*, 66.

(*d*) Co. Litt. 46 b. (See also the Somersham Rectory Act, 1882, converting that benefice into a vicarage.)

In lay appropriations, there is generally a spiritual person attached to the same church, under the name of *vicar*, to whom the spiritual duty, or *cure of souls* (*a*) (as it is termed), belongs ; and to whom a certain portion of the tithes or other emoluments of the church is assigned, by way of exception out of those enjoyed by the appropriator. The origin of vicars was as follows (*b*) :—

[The appropriating corporations or religious houses were wont to depute one of their own body to perform divine service, and to administer the sacraments ; and this officiating minister, or deputy, was in reality the mere vicegerent of the appropriator, and was therefore called vicar (*vicarius*) (*c*). His stipend was at the discretion of the appropriator, who was, however, bound of common right to find somebody ; but this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose. Accordingly, by the 15 Ric. 2 (1391) c. 6, it was enacted, that in all appropriations of benefices, the diocesan bishop should require a competent sum to be distributed among the poor parishioners annually, and that the vicarage should be sufficiently endowed ; and by the 4 Hen. 4 (1402) c. 12, it was ordained, that the vicar, who, from thenceforth, was not to be a member of any religious house, should be a vicar perpetual, and not removable at the caprice of the monastery, and should be canonically instituted and inducted, and sufficiently endowed at the discretion of the Ordinary, for three express purposes, viz., to do divine service, to inform the people, and to keep hospitality (*d*). In consequence

(*a*) *I.e.*, *Care of souls* (*cura*). at p. 780 ; Rogers, *Eccl. Law*

(*b*) Y. B. 40 Edw. 3 (edn. (2nd edn.), 971.

1679), p. 27 ; *Britton v. Wade*

(1619) Cro. Jac. at p. 516 ;

*Bird v. Relph* (1835) 2 A. & E.

(*c*) *Grendon v. Bishop of Lincoln* (1576) Plowd. 493.

(*d*) From this Act (4 Hen. 4

[of these two statutes, the endowment of vicarages has usually been by a portion of the glebe lands belonging to the parsonage, and by a share of the tithes ; the greater part of the tithes being, however, still reserved to the use of the appropriator. But one and the same rule was not observed in the endowment of all vicarages ; wherefore some are more liberally, and others more scantily, endowed. And the tithes of many things, as wood in particular, were in some parishes rectorial, and in others vicarial.]

Such is the history of the distinction between rectors and vicars ; and the law on the subject may be shortly stated as follows. Of parochial churches, some have been appropriated, others have not. In a non-appropriated living, there is no vicar, but a rector only, who must be a spiritual person, and who has the cure of souls in the parish, with the exclusive title to all the emoluments (*a*). In an appropriated living, there is generally (besides the appropriator) a vicar ; and in such cases, the appropriator never has the cure of souls within the parish, that being committed exclusively to the vicar. The emoluments of appropriated livings belong in part to the appropriator, in part to the vicar, according to the distinctions already in part referred to ; and, in non-appropriated churches, the rector, and in appropriated churches, the vicar, is seised

c. 12) may be dated the origin of the present vicarages. Before that time, the vicar was nothing more than a temporary curate, and was generally one of the *regular* (or monastic) clergy ; the monks, who lived according to the rules of their respective houses, being so denominated, in contradistinction to the parochial clergy, who, as they performed their ministry in

the world (*in seculo*), were called *secular* clergy.

(*a*) By the Spiritual Duties Act, 1839, reciting that there are several benefices, in which more than one spiritual person has the general cure of souls, the bishop is empowered, where such is the case, to order an apportionment of the spiritual services, subject to an appeal to the archbishop.

for his life only, the fee being in abeyance. But the appropriator may be entitled either in fee or for a less estate, according to the circumstances of his title (*a*).

But it is not in all appropriations that a vicar exists ; for in some it happens, in consequence of their being exempted, for particular reasons, from the statute of 4 Hen. 4 (1402) c. 12, that no vicar has ever been endowed (*b*). Such churches, however, usually have a permanent minister in holy orders, of the same general description as a vicar ; and he, under the denomination of *perpetual curate*, is admitted to the benefice by the bishop's licence, and is charged with the cure of souls. Such a person is entitled to emolument for his services, is liable to his successor for dilapidations (*c*), and is in most other respects situated similarly to a vicar (*d*). Owing to the growth of population in the great towns and elsewhere, provision has been made by a series of Church Building Acts, from 1818 to 1884, and by the New Parishes Acts, 1843 to 1884, for the creation of new parishes or districts. Of these there are several kinds—distinct and separate parishes, district parishes, district chapelries, consolidated chapelries, and Peel parishes and districts ; and of many of these districts or divisions, the incumbents were originally only perpetual curates. But, by the Incumbents Act, 1868, the incumbent of the church of every parish or new parish for ecclesiastical purposes, not being a rector who is entitled to perform marriages, churchings, and baptisms, and to claim the fees thereof for his own use, is, for the purpose of style and designation, but not for any other purpose, to be

(*a*) *Grendon v. Bishop of Lincoln* (1576) Plowd. 493 ;  
*Duke of Portland v. Bingham*  
 (1792) 1 Hagg. Consist. Rep.  
 at p. 162.

(*b*) 2 Burn, *Ecccl. Law*, 55 b.

(*c*) *Mason v. Lambert*  
 (1848) 12 Q. B. 795.

(*d*) *Doe v. Thomas* (1839) 9  
 A. & E. 556 ; *Doe d. Bram-*  
*mall v. Collinge* (1849) 7 C. B.  
 939.

deemed and styled the ‘vicar,’ and his benefice a ‘vicarage.’ The effect of this provision, when read together with the New Parishes Act, 1856 (known as Lord Blandford’s Act) (a), is to make almost all incumbents, who are not rectors, practically vicars.

It is to be observed also, that in former times the rector of a benefice, having cure of souls, sometimes obtained permission to appoint a vicar to officiate under him ; so that, by this means, two persons were instituted to the same church, and both had cure of souls. The effect of this was, that by custom the rector became at length entirely relieved from residence, and from all other spiritual duties ; whence he came to be called a *sinecure rector*, or rector without cure of souls (b). But by the Ecclesiastical Commissioners Act, 1840 (c), it was provided, that all ecclesiastical rectories without cure of souls, having vicars endowed or perpetual curates, which were in the sole patronage of the Crown or of any ecclesiastical corporation aggregate or sole, should, immediately upon the first vacancies, be entirely suppressed ; and that the patronage of all others might be at any time sold to the Ecclesiastical Commissioners, and should thereupon be also suppressed ; and that the lands, tithes, and endowments of any such suppressed sinecure rectory might be annexed, when it should appear expedient, to the vicarage or perpetual curacy, which should thereupon be constituted a rectory with cure of souls.

We have thus had occasion to speak of three several kinds of parochial preferments, viz., rectories, vicarages, and perpetual curacies ; and as to each of these we may remark, that they are usually comprehended under the

(a) Ss. 2, 14, 15. (See also Queen Anne’s Bounty Act, 1714, ss. 4, 21 ; Ecclesiastical Dilapidations Act 1871, s. 3.)

(b) 3 Burn, *Eccl. Law*, 649 ; Rogers, *Eccl. Law* (2nd edn.), 972.

(c) Ss. 48, 54, 55.

general term of *benefice* (a)—a term indeed which, in its technical sense, though not in its popular acceptation, extends not only to these, but also to any ecclesiastical preferments to which rank or public office is attached, and which are described in our books as ecclesiastical dignities or offices, such as bishoprics, deaneries, and the like (b). But in statutes, these latter are in general distinguished (c).

2. The methods of becoming a rector and becoming a vicar are much the same. To both there are, in general, four requisites necessary; namely, *holy orders*, *presentation*, *institution*, and *induction* (d). By the Act of Uniformity (1662) (e) no person is capable of being admitted to any benefice, unless he has been first ordained priest; and, by the Benefices Act, 1898 (f), the bishop may refuse to institute if not more than three years have elapsed since the priest who is presented was ordained deacon.

[Any person thus qualified may be *presented* to a rectory or vicarage; that is, the patron to whom the advowson of the church belongs may offer his nominee to the bishop of the diocese to be instituted. But, when a clerk is presented, the bishop may, upon many accounts, refuse to institute him. As if the patron is excommunicated, and remains in contempt forty

(a) Benefices Act, 1898. and other Acts.

(b) 3 Inst. 155.

(c) Pluralities Act, 1838, s. 124. In that Act (but for the purposes of the Act only), *benefices* are distinguished from *cathedral preferments*; 'benefices' denoting all parochial or district churches, and endowed chapels and chapelries, and 'cathedral preferments' denoting all deaneries, archdeaconries,

and canonries, and (generally) all dignities and offices in any cathedral or collegiate church below the rank of bishop.

(d) A titular vicar under the Incumbents Act, 1868 (see *ante*, p. 774), may be admitted to the benefice and its temporalities by licence, instead of by institution and induction.

(e) S. 14.

(f) S. 2 (1) (b).

[days (a). Or if the clerk be unfit ; which unfitness may be of several kinds. First, with regard to his person ; as if he be an outlaw, an excommunicate, or an evil liver, or pecuniarily embarrassed or under age, or the like (b). But bastardy is no longer a ground of unfitness (c). Again, with regard to his faith or morals ; as if he be charged with any particular heresy, or vice that is *malum in se*. But if the bishop objects only for a fault that is *malum prohibitum*—as haunting taverns, playing at unlawful games, or the like—it is not good cause of refusal (d). Lastly, the clerk may be unfit to discharge the pastoral office for want of learning (e), or for want of knowledge of Welsh where the living is in Wales (f). In any of these cases, the bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning or of language, or other matter of ecclesiastical cognisance, the bishop must give notice to the patron of such his cause of refusal, at least if the patron be a layman ; for in that case he is presumably unaware of the disability. If the objection were a temporal one, the bishop was not formerly bound to give such notice (g).] But under the Benefices Act, 1898 (h), notice must now be given both to the patron and to the presentee ; and there is an appeal from the refusal to the Court constituted for this purpose by the Act, namely,

(a) 2 Roll. Abr. 355.

(b) Benefices Act, 1898, s. 2  
(1) (b).

(c) *Kensit v. St. Paul's  
(Dean & Chapter)* [1905] 2  
K. B. at p. 257.

(d) *Specot's Case* (1590) 5  
Rep. 57 a ; *Heywood v. Bishop  
of Manchester* (1884) 12 Q. B.  
D. 404. (But see now Bene-  
fices Act, 1898, s. 2 (1) (b).)

(e) Canon 39 of 1603 ; 1  
Burn, *Ecc. Law*, 156–156 r.

(f) Pluralities Act, 1838,  
s. 104 ; *Abergavenny (Mar-  
quis) v. Bishop of Llandaff*  
(1888) 20 Q. B. D. 460.

(g) *Bedinfield v. Arch-  
bishop of Canterbury* (1570)  
Dyer, 292, b. ; *Hele v. Bishop  
of Exeter* (1692) 2 Salk. 539 ;  
*Albany v. Bishop of St. Asaph*  
(1585) Cro. Eliz. 119 ; 2 Inst.  
632 ; 1 Burn, *Ecc. Law*, 158.

(h) S. 3.



to the Archbishop and a Judge of the Supreme Court.

[If the bishop hath no objection, but allows the patron's presentee, the clerk so allowed (unless admitted by *licence*) is next to be *instituted* by the bishop. Institution invests the clerk with the care of the souls of the parish committed to his charge ; but when the bishop is also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a *collation* to the benefice.] By the Benefices Act, 1898 (*a*), the bishop cannot collate, institute, or admit any person to a benefice, until one month after a notice that he intends to do so has been served on the churchwardens, and has been published by them. And before institution or (as the case may be) collation, the clerk must renew the 'declaration of assent' which he made previously to his ordination, and must make and subscribe the declaration against simony, provided in the Benefices Act, 1898. He must also take the oath of allegiance to the King, in the terms of the Promissory Oaths Act, 1868, before the archbishop or bishop, or their commissary ; and the oath of canonical obedience to his bishop (*b*). [By institution or collation, the church is full ; at least in the case of a common patron. But the church is not full against the Crown till induction ; so much so that, even if a clerk has been instituted upon the Crown's presentation, the Crown may before induction revoke it, and present another clerk (*c*). Upon institution, the clerk may enter on the parsonage house and glebe, and take the tithes ; but he may not grant or let them, or bring an action for them till induction (*d*).

*Induction* to the temporalities is performed by a

(*a*) S. 2 (2).

(*c*) Co. Litt. 344 a, b.

(*b*) Clerical Subscription Act, 1865, ss. 5, 12.

(*d*) *Ibid.* 300, and n. (1).

[mandate from the bishop to the archdeacon, who may issue out a precept to another clergyman to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like ; the original intent having been to give all the parishioners due notice and sufficient certainty of their new minister. This, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual ; and when a clerk is thus presented, instituted, and inducted into a living, he is then, and not before, in full and complete possession (a).] The title, however, of any person instituted, collated, or licensed, to any benefice with cure of souls, will be afterwards divested ; unless on the first Lord's Day on which he officiates in the church of the benefice, or such other Lord's Day as the Ordinary may appoint and allow, he shall publicly read therein, in the presence of the congregation, the Thirty-nine Articles of Religion, and immediately afterwards repeat the 'declaration of assent' which he made previously to his admission (b). This formality is called 'reading in.'

In addition to the methods of acquisition which have been mentioned, there were formerly benefices which a clerk might obtain by mere donation, that is, by deed of gift alone, without presentation, institution, or induction ; and they were thence called *donative* benefices. [These last-mentioned benefices were created whenever the King, or any subject by his licence, founded a church or chapel, and ordained that it should be merely in the gift or disposal of the patron ; be subject to his visitation only, and not to that of the Ordinary ; and become vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction (c). This is said

(a) 1 Burn, *Eccl. Law*, 176. Act, 1865, s. 7.

(b) Clerical Subscription (c) Co. Litt. 344 a.

[to have been antiently the only way of conferring ecclesiastical benefices in England (a). But the truth seems to be: that where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him; but that where the clerk was already in orders, the living was usually vested in him by the simple donation of the patron.

If the patron of a donative once waived his privilege, the advowson became for ever presentative, and could never be donative any more (b);] and now, by the Benefices Act, 1898 (c), all donative advowsons are made presentative.

[3. The *rights* of the clergy in their tithes and ecclesiastical dues will be considered hereafter as part of the endowments and provisions of the Church (d); and as regards the *duties* of the clergy, these are principally of ecclesiastical cognisance, except where otherwise appointed by statute (e). We shall here refer, therefore, only to the article of residence; upon the supposition of which the law doth style every parochial minister an *incumbent*.]

The present enactments on the subject of residence will be found in the Pluralities Acts, 1838 and 1885, and in the Benefices Act, 1898. The first of these Acts provides, that every spiritual person holding a benefice shall reside thereon, and in the house of

(a) Seld. *Tythes*, ch. xii. s. 2; Decretal, l. 3, t. 7, c. 3.

(b) Co. Litt. 344 a; *Farchild v. Gayre* (1603) Cro. Jac. 63; Wats. *Clerg. Law*, 169.

(c) S. 12.

(d) See *post*, bk. iv. pt. ii. ch. iii.

(e) Among the treatises on the law of the Church which may be relied upon with con-

fidence, are Bishop Gibson's *Codex*, Dr. Burn's *Ecclesiastical Law*, Dr. Phillimore's *Ecclesiastical Law*, the earlier editions of the *Clergyman's Law*, published under the name of Dr. Watson, but compiled by Mr. Place, a barrister, and *Laws of England* (tit. 'Ecclesiastical Law'), vol. xi. pp. 349-829.

residence (if any) belonging thereto ; and that if he absents himself for a period exceeding three months, (either accounted together or at several times,) in any one year, he shall forfeit, unless resident at some other benefice to him belonging, a portion of the annual value of the benefice at which he so fails to reside (*a*). But this rule is subject to various exceptions and modifications, in respect of heads of colleges and halls in the Universities of Oxford or Cambridge, the Warden of the University of Durham, and the head masters of Eton, Winchester, and Westminster Schools ; deans and archdeacons, and a variety of public professors, readers, preachers, and chaplains specified in the Act ; as likewise the Provost of Eton, the Warden of Winchester, the Master of the Charterhouse, the Principals of St. David's College, Lampeter, and of King's College, London (*b*). And if there be no fit residence belonging to the benefice, the bishop may from time to time license the incumbent to reside in some other house within a certain specified distance from his church or chapel ; and such house thereupon becomes a legal house of residence for all purposes (*c*). If there be no fit house of residence, and no convenient house can be obtained within the specified distance, or if the incumbent cannot reside on his benefice by reason of any incapacity of mind or body, or owing to the dangerous illness of his wife or child (but subject in the latter case to certain restrictions as to time and otherwise), application may be made to the bishop for a licence of non-residence (*d*). If the incumbent occupies in the same parish any house whereof he is the owner, a similar application for a licence to reside therein may be made (*e*) ; and the bishop is empowered, in any other case, under special circumstances, and

\* (*a*) Act of 1838, ss. 32–35.

(*b*) *Ibid.* ss. 38, 39.

(*c*) *Ibid.* s. 33.

(*d*) *Ibid.* ss. 42, 43.

(*e*) *Ibid.* s. 43.

subject to allowance by the archbishop, to grant a licence to reside out of the limits of the benefice (a).

It is further provided by the Pluralities Act, 1838, that annual returns of such of the clergy as are resident, and of such as are non-resident, shall be made to His Majesty in Council (b); and that, in case of non-residence, the bishop, instead of proceeding to enforce the penalties above mentioned, may, if he thinks fit, issue a monition against the offender, to be followed up by an order to reside. In case of non-compliance with such order, the bishop may proceed to sequester the profits of the benefice, and apply them for the purposes in the Act specified (c); and in the event of sequestration being continued for a year, or repeated within two years, the benefice is to become void, and a new presentation may then be made, as if the former holder were dead (d).

For the more effectual promotion of this important duty of residence among the parochial clergy, there is also contained in the statute book a variety of provisions for repairing the houses of residence, and for building or purchasing new ones, and for raising money, for these purposes, by mortgage of the benefices (e): the money being usually lent by the Governors of Queen Anne's Bounty (f).

4. There are many ways in which a clerk may lose his preferment. He may lose it, first, by *cession*, or

(a) Act of 1838, s. 44.

(b) *Ibid.* ss. 52, 53.

(c) *Ibid.* s. 54; *Bartlett v. Kirwood* (1853) 2 El. & Bl. 771.

(d) S. 58; *Ex parte Bartlett* (1848) 12 Q. B. 488.

(e) Clergy Residences Repair Acts, 1776 and 1780; Queen Anne's Bounty Act, 1803; Gifts for Churches Acts, 1803 and 1811; Glebe

Exchange Acts, 1815, 1816, and 1825; Clergy Residence Act, 1826; Parsonages Act, 1838, and Amendment Act, 1838; Pluralities Act, 1838, ss. 25, 62, &c.; New Parishes Act, 1856; Parsonages Act, 1865; Ecclesiastical Dilapidations Act, 1871.

(f) Incumbents of Benefices Loans Extension Acts 1887 and 1896.

taking another benefice. For, by the Pluralities Act, 1838, as amended by the Pluralities Act, 1850, and the Pluralities Act, 1885, a person may not hold together two or more benefices (*a*) ; except that, upon a certificate of the bishop as to the facts, and with a licence or dispensation from the archbishop (from the refusal of which there is an appeal to the King in Council), he may hold a second, the church whereof is within four miles of the first, by the nearest road, or which, if only one of them has a church, is similarly near to the first. But the net annual value of one of the benefices must not exceed 200*l.* (*b*) ; and no person, holding two benefices with cure of souls, may hold therewith a third, or any cathedral preferment, except an honorary canonry (*c*). Upon every admission to a new benefice or preferment contrary to these Acts, every benefice previously held becomes void *ipso facto* (*d*).

[A clerk may lose his preferment, in the second place, by *consecration*. For when a clerk is promoted to a bishopric, all his other preferments are void the instant that he is consecrated. A method was formerly in use, by the favour of the Crown, of holding such livings *in commendam*. *Commenda, ecclesia commendata*, was a living commended by the Crown to the care of a clerk, to hold till a proper pastor should be provided for it ; which commendation might be temporary—for one, two, or three years—or it might be perpetual. And

(*a*) Act of 1838, s. 2.

(*b*) *Ibid.* ss. 6–9, 129 ; Act of 1850, ss. 3, 4 ; Act of 1885, s. 14 (which virtually repealed ss. 4, 5 of the Act of 1838 and ss. 1, 2 of the Act of 1850).

(*c*) Acts of 1838, s. 2 ; Ecclesiastical Commissioners Act, 1841, s. 3 ; Pluralities Act, 1850, s. 11. (See

also, as regards *deans of cathedrals*, Ecclesiastical Commissioners Act, 1850, s. 19 ; as regards *archdeacons*, Pluralities Act, 1838, s. 2 ; Ecclesiastical Commissioners Act, 1841, ss. 9, 10 ; and as regards *heads of colleges*, Pluralities Act, 1850, ss. 5, 6.)

(*d*) Act of 1838, s. 11 ; Act of 1850, s. 7.

[this sort of commendation used to be granted to bishops in the poorer sees, to aid the deficiency of their episcopal revenues (a).] But now, by the Ecclesiastical Commissioners Act, 1836 (b), no ecclesiastical dignity, office, or benefice may, in future, be held *in commendam* by any bishop; and every *commendam* thereafter granted, whether to retain or to receive, and whether temporary or perpetual, is absolutely void to all intents and purposes (c).

A clerk may lose his preferment, thirdly, [by *deprivation*. Which may be, on such nonfeasance or neglect, malfeasance or crime, *e.g.*, simony (d), as any penal statutes declare shall avoid the benefice, in which cases, the benefice is *ipso facto* void without any formal sentence of deprivation (e); or it may be, upon sentence declaratory under the Clergy Discipline Act, 1892 (f), and a canon of the same year, on the clerk's conviction of treason, or felony, or of a misdemeanor involving imprisonment with hard labour or any greater punishment (g); or on a bastardy order being made against him; or on a finding of the Divorce Court that he has committed adultery; or on a separation order being made against him, by the Divorce Court (h)—the bishop in every such case declaring, within twenty-one days after the conviction, finding,

(a) *Colt v. Bishop of Lichfield and Coventry* (1613) Hob. at p. 144.

(b) S. 18.

(c) See also (as to the Bishop of Sodor and Man) Sodor and Man Act, 1838 (1 & 2 Vict. c. 30, s. 3).

(d) 31 Eliz. (1588) c. 6, ss. 5, 6; 13 Ann. (1713) c. 11.

(e) Forfeiture Act, 1870, s. 2.

(f) S. 1.

(g) S. 1 (1) (a); *Bishop of*

*Chichester v. Webb* (1555) Dyer, 108; Jenk. 210.

(h) Clergy Discipline Act, 1892, s. 1 (b), (c), (d). Deprivation cannot be enforced on the ground of a separation order made under the Summary Jurisdiction (Married Women) Act, 1895, which has superseded the procedure referred to in s. 1 (e) (*Sweet v. Bishop of Ely* [1902] 2 Ch. 508).

[or order becomes final, his benefice vacant and himself incapable of holding preferment (*a*). By the Clerical Subscription Act, 1865 (*b*), neglect to read in church the Thirty-nine Articles, and to make the proper 'declaration of assent' at the proper time, causes a forfeiture of the benefice; and, under the Benefices Act, 1898 (*c*), a sequestration on bankruptcy, or in aid of an execution, which has continued for one whole year, or is repeated within two years, is made a ground of deprivation. The Act of 1892 also provides for a sentence of deprivation for offences against morality in other cases, including simony (*d*); and, independently of that Act, a sentence of deprivation may be pronounced for heresy or infidelity, or for maintaining any doctrine in derogation of the King's supremacy, or of the Thirty-nine Articles, or of the Book of Common Prayer (*e*), or for illegal ceremonies or observances (*f*); or for using any other form of prayer than the Liturgy of the Church of England (*g*); or on a third conviction of having engaged in trade (*h*); or for continued neglect, after order from the bishop followed by sequestration, to reside on the benefice (*i*).

Finally, a clerk may lose his preferment by *resignation*; but this is of no avail, till accepted by the Ordinary, into whose hands the resignation of the benefice must be made (*k*). In connection with this

(*a*) Clergy Discipline Act, 1892, s. 1; Gibs. *Cod.* 1068.

(*b*) S. 7.

(*c*) S. 10.

(*d*) Ss. 2, 6 (1) (*b*), and Benefices Act, 1898, s. 1 (5).

(*e*) 1 Eliz. (1558) cc. 1, 2; 13 Eliz. (1571) c. 12, s. 2. (See *Ex parte Denison* (1854) 4 El. & Bl. 292; *Voysey v. Noble* (1870) L. R. 3 P. C. 357.)

(*f*) *Combe v. Edwards* (1878) 3 P. D. 103. It is

often stated that the only penalty at present for illegal practices of the clergy is imprisonment. This is incorrect: deprivation has always been the ultimate penalty.

(*g*) 1 Eliz. (1558) c. 2.

(*h*) Pluralities Act, 1838, s. 31.

(*i*) *Ibid.* s. 58.

(*k*) *Fane's Case* (1608) Cro. Jac. 197. As to deprivation



last mode of vacating a preferment, it is necessary to notice an Act, called the Clerical Disabilities Act, 1870, which was passed with the object of relieving persons who had been admitted to the office of priest or deacon in the Church of England, and desired to relinquish it, from certain disadvantages to which, until protected by that statute, they were exposed. For the Act provides, that any person admitted to holy orders may, after having resigned any and every preferment held by him, execute and cause to be enrolled in Chancery a deed of relinquishment in a prescribed form, and deliver an office copy of the same to the bishop of his diocese, to be recorded in the diocesan registry; and then, on the bishop causing the deed to be recorded in the registry, the clergyman becomes incapable of acting in any way as a minister of the Church of England, and ceases to enjoy any right or privilege attaching to such office. On the other hand, he is freed from all disabilities, disqualifications, restraints, and prohibitions to which he would, under certain statutes, have been subject as a person who had been admitted to holy orders (*a*), and from all penalties and proceedings to which he might under any law have been amenable, in consequence of any act or thing done by him after such admission (*b*). And we may also usefully notice here another Act, called the Incumbents Resignation Act, 1871, by which, as amended by an Act of 1887, a clergyman permanently incapacitated by illness may resign his benefice, and may receive a pension, to the amount of one-third of the clear annual value, charged on the revenues of the

after resignation, see *Martin v. Mackonochie* (1883) 8 P. D. 191.

(*a*) See House of Commons (Clergy Disqualification) Act, 1801; Municipal Corpora-

tions Act, 1882, s. 12.

(*b*) There is a *locus pœnitentiæ*, if nothing more is done after enrolment (*Ex parte a Clergyman* (1873) L. R. 15 Eq. 154).

benefice, and recoverable as a debt from the subsequent incumbent thereof.

VI. The lowest rank among the parochial clergy is that of the assistant or stipendiary CURATE, who is a clerk in holy orders employed either to serve in the absence of the incumbent of a living, or as his assistant, as the case may be (*a*). Every stipendiary curate, before he enters on his duties, must be *licensed* by the archbishop or bishop of the diocese (*b*) ; and such licence may be afterwards revoked (*c*). Also, before the licence is granted, the curate must sign the stipendiary curate's declaration, that he will *bonâ fide* receive from his future vicar the whole stipend as arranged (*d*). He must also, on entering on his curacy (unless, having been ordained on the same day, he has already done so), make and subscribe the 'declaration of assent' to the Thirty-nine Articles and Book of Common Prayer ; and on the first Lord's Day on which he officiates, he must publicly and openly repeat such declaration in the presence of the congregation, and during the time of divine service (*e*).

For the proper sustentation and payment of licensed curates, the law has made a variety of provisions. Thus, by the 28 Hen. 8 (1536) c. 11, a curate who

(*a*) 2 Burn, *Eccl. Law*, 54–77 ; *Arnold v. Bishop of Bath* (1829) 5 Bing. 316 ; and, as to *lecturers* and *preachers*, see *Lecturers and Parish Clerks Act*, 1844. The term *curate* means a clergyman entrusted with the cure of souls, and strictly includes all the parochial clergy, as in the Prayers for the Clergy and People, and for the Church Militant. (For recent judicial observations on the legal position of

curates, see *Re Curates' Employment in the Church of England* [1912] 2 Ch. 563.)

(*b*) 2 Burn, *Eccl. Law*, 61 ; *Wats. Clerg. Law*, 147, 209, 338.

(*c*) *Pluralities Act*, 1838, s. 98 ; *R. v. Archbishop of Canterbury* (1859) 1 El. & El. 545 ; *Poole v. Bishop of London* (1861) 7 Jur. (N.S.) 347.

(*d*) *Clerical Subscription Act*, 1865, ss. 3, 6.

(*e*) *Ibid.* s. 8.

serves a church during its vacancy shall be paid such stipend as the Ordinary thinks reasonable, out of the profits accruing during the vacancy ; or, if that be not sufficient, it shall be made up by the successor, within fourteen days after he takes possession (*a*). By the Pluralities Act, 1838, numerous provisions are made as to the appointment and payment of curates, among which are the following :—that in certain cases of non-residence by the incumbent, the bishop may, in his default, appoint a proper resident curate, with a stipend (*b*) ; that where the bishop sees reason to believe that the duties of any benefice are inadequately performed, or where it is of a certain value or extent, he may (though in the first case only after referring the matter to certain commissioners appointed by him for that purpose) require the incumbent, whether actually resident or not, to nominate a proper curate with sufficient stipend, and on his default may himself make such appointment (*c*), or even may now, by the Benefices Act, 1898 (*d*), himself make the appointment without first requiring the incumbent to do so ; and that the stipend of every curate appointed by the bishop in the case of non-residence shall be adjusted in proportion to the value and population of the benefice, the stipend not in any case falling short of 80*l.* per annum, or of the whole annual value of the benefice, if it be under that amount (*e*).

In all cases of dispute between an incumbent and his curate as to his stipend, the bishop may summarily decide between them without appeal, and may enforce his sentence by monition and sequestration (*f*). By

(*a*) S. 10. (See now Pluralities Act, 1838, ss. 99–101 ; and Act of 1885, s. 10.)

(*b*) Ss. 75, 76, 83–89.

(*c*) Act of 1838, ss. 77, 78.

(And see Act of 1885, ss. 2–4.)

(*d*) S. 9.

(*e*) Pluralities Act, 1838, ss. 85–87.

(*f*) *Ibid.* s. 83 ; *Daniel v. Morton* (1850) 16 Q. B. 198.

the Pluralities Act, 1885, it is provided, that the bishop may assign to any curate or curates appointed and licensed by him, in case of inadequate performance of duties, such stipends as he may think fit, not exceeding by 70*l.* the respective stipends allowed to curates by the Act of 1838, in the case of non-resident incumbents (*a*); and may in certain cases appoint two or more curates in the case of such non-resident incumbents (*b*), with an adequate provision for each. By the same Act it is also provided (*c*), that whenever the incumbent of any benefice is non-resident with the licence of the bishop, he shall not, without the bishop's permission, resume the duties of the benefice until the expiration of the licence, or interfere with the curate or curates thereof appointed by the bishop.

VII. [CHURCHWARDENS (*d*) are the guardians or keepers of the fabric and furniture of the church, and the representatives of the general body of the parishioners;] and are lay church officers (*e*). They are sometimes appointed by the minister, sometimes by the parish in vestry assembled (*f*), and sometimes by both minister and parishioners together, as the custom of the place directs (*g*). But, where there is no such custom, the election must be according to the directions of the canons (*h*); and these require that churchwardens shall be chosen by the joint consent

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| ( <i>a</i> ) S. 8.                         | <i>Bishop's Case</i> (1620) 2 Roll.           |
| ( <i>b</i> ) S. 9.                         | Rep. at p. 107; <i>Dawson v.</i>              |
| ( <i>c</i> ) S. 12.                        | <i>Fowle</i> (1664) Hardr. at p. 379.         |
| ( <i>d</i> ) Bac. Abr.; Burn, <i>Eccl.</i> | ( <i>f</i> ) As to vestries, <i>vide sup.</i> |
| <i>Law</i> ; <i>Encyclop. of the Laws</i>  | vol. i. p. 75.                                |
| <i>of England</i> , tit. 'Church-          | ( <i>g</i> ) <i>Campbell v. Maund</i>         |
| 'wardens'; <i>Ex parte Winfield</i>        | (1836) 5 A. & E. 865; <i>R. v.</i>            |
| (1835) 3 A. & E. 614-618; <i>R.</i>        | <i>Rector of Lambeth</i> (1838) 8             |
| <i>v. Marsh</i> (1836) 5 A. & E.           | A. & E. 356; <i>Bremner v. Hull</i>           |
| 468; <i>Bray v. Somer</i> (1862) 2         | (1866) L. R. 1 C. P. 748.                     |
| B. & S. 374.                               | ( <i>h</i> ) <i>Catten v. Barwick</i> (1718)  |
| ( <i>e</i> ) 1 Roll. Ab. 653;              | 1 Str. 145.                                   |

of the minister and parishioners, if it may be, but, if they cannot agree, then the minister is to choose one, and the parishioners another (*a*). The Church Building Acts (*b*), and the New Parishes Acts (*c*), as to the churches respectively within the provisions of those Acts, contain express provisions as to the election of churchwardens; as do schemes under the London Government Act, 1899 (*d*), in the case of old ecclesiastical parishes in the metropolis. In general, all churchwardens are chosen yearly in Easter week, and are usually two in number for each parish; they are obliged, when chosen, to serve (*e*), and make a declaration that they will execute their office faithfully (*f*). [They are taken, in favour of the church, to be for some purposes a kind of corporation at common law; that is, they are enabled, by the name of 'churchwardens,' to have a property in the goods and chattels of the church, and also goods and chattels for the use and profit of the parish, and to bring actions for them (*g*). And it is said, that churchwardens

(*a*) Canon 89 of 1603; *R. v. Allen* (1872) L. R. 8 Q. B. 69; *R. v. Bishop of Salisbury* [1901] 1 K. B. 573; 2 K. B. 225.

(*b*) Act of 1818, s. 73; Act of 1831, ss. 16, 25; and Act of 1845, ss. 6–8.

(*c*) Act of 1843, s. 17. (See Act of 1856, ss. 14, 15.)

(*d*) S. 23.

(*e*) Certain classes of persons are either ineligible or exempted; as aliens, Jews, children, persons convicted of felony, fraud, or perjury, peers of the realm, members of Parliament, clergymen of the Church of England, Roman Catholic clergy, dissenting ministers, practising

barristers and solicitors, officers of the superior courts and other public officials, physicians, surgeons, and apothecaries (if duly registered), sheriffs, aldermen, and all persons living out of the parish, unless they occupy a house of trade therein. (See Steer, *Parish Law* (6th edn.), pp. 104–6; Smith, *Law of Churchwardens*, pp. 27, 28.)

(*f*) Statutory Declarations Act, 1835, s. 9.

(*g*) Poor Relief Acts, 1722, s. 4; and (in regard to *parish lands*) 1819, ss. 8, 17; 5 & 6 Will. 4 (1835) c. 69, s. 4; *Smith v. Adkins* (1841) 8 M. & W. 362; and (in regard to compensation for the *common*

[in the city of London are a corporation for all purposes (a).

One of the chief duties of churchwardens is the care and management of the goods belonging to the furniture of the church; such as the organ, bells, Bible, and parish books (b). But as to the fabric of the church and also as to the churchyard, they have no sort of interest in the property thereof; and if any damage be done thereto, the rector only, or vicar, shall have the action (c).] This last remark, of course, does not apply to the cemeteries and burial grounds set apart under the modern Burial Acts (d).

It is also part of the office of churchwardens, unless other persons are appointed by the Ordinary for that purpose, to be entrusted by him, as sequestrators, with the care of the benefice, during its vacancy, or while it is under sequestration for the debts of the incumbent (e). They are, moreover, required to see to the reparation of the church, and formerly were entrusted with the making of the church rates for defraying the expenses thereof. These rates were charged on all lands and houses in the parish, were assessed on the occupiers, and were made by the parishioners at large; that is, by the majority of the parishioners present at a vestry summoned for that purpose by the churchwardens (f). But they are not now, as a

*rights of parishes*) Inclosure Act, 1882. Much of the secular authority of the churchwardens has, however, in the case of rural parishes, been transferred to the parish council. (See Local Government Act, 1894, ss. 5, 6.)

(a) Pulling, *Laws, &c. of London*, 263; Rogers, *Eccl. Law* (2nd edn.), 250.

(b) Bac. Abr. *Churchwardens*, B.; Wats. *Clerg.*

*Law*, 400; *Addison v. Round* (1836) 4 A. & E. 799; *Jackson v. Adams* (1835) 2 Bing. N. C. 402.

(c) *Beckwith v. Harding* (1818) 1 B. & Ald. 508; *Batten v. Gedye* (1889) 41 Ch. D. 507.

(d) See *post*, vol. iii. p. 114.

(e) Steer, *Parish Law* (6th edn.), 114.

(f) *Burder v. Velej* (1840)

general rule, made; since they are no longer compulsory on the persons rated, and the only consequence of refusing to pay them is a disqualification from voting on the expenditure of the moneys arising from the rate. This important change in the law was effected by the Compulsory Church Rates Abolition Act, 1868; the reason being, that church rates had for years ceased to be made or collected in many parishes by reason of the opposition thereto, and the levying thereof had given rise to litigation and ill-feeling. But there are excepted from the operation of the Act all rates which, under the name of church rates, are made by the authority of any Act of Parliament, and are applicable in part to other than ecclesiastical purposes; and some other special cases. These accordingly are governed by the previous law on the subject. Voluntary rates are still often levied for church schools and the like.

It is a further part of the duties of churchwardens to make such order relative to seats in the church and chancel, not appropriated to particular persons, as the Ordinary—who has in general the sole power in this matter (*a*)—shall direct; and in practice, the arrangements with regard to the sittings are usually made by the churchwardens, without any special direction from the Ordinary (*b*). It is incident also to the office of churchwarden, to enforce proper and orderly behaviour in the church and its precincts during the performance of divine service (*c*); and to this end, it has been held, that a churchwarden may

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| 12 A. & E. 233; <i>Gosling v. Veley</i> (1852) 4 H. L. C. 679.   | L. R. 3 A. & E. at p. 119.  |
| ( <i>a</i> ) 3 Inst. 202; <i>Wats. Olerg. Law</i> , 391; <i>Gibs. Cod.</i> 200; <i>Clifford v. Wicks</i> (1818) 1 B. & Ald. 498. | ( <i>c</i> ) <i>Worth v. Terrington</i> (1845) 13 M. & W. 781; <i>Asher v. Calcraft</i> (1887) 18 Q. B. D. 607; <i>Taylor v. Timson</i> (1888) 20 Q. B. D. 671; Ecclesiastical Courts Jurisdiction Act, 1860, s. 3. |
| ( <i>b</i> ) <i>Rogers, Eccl. Law</i> , 176; <i>Ritchings v. Cordingley</i> (1868)   |   |

justify the pulling off a man's hat irreverently worn in the church, or the removal of the offender from the church (a). And besides these, there were a multitude of other parochial powers committed to the charge of the churchwardens which cannot be here particularised with minuteness. Formerly, also, the churchwardens were entitled, and even obliged, by the Act of Uniformity of 1558, to levy a tax of one shilling on every householder who failed to resort to his own parish church on Sundays or holidays. But this enactment was repealed by the Religious Disabilities Act, 1846. Formerly, also, the churchwardens were joined with the overseers in the care and maintenance of the poor (b); but this duty is now in general taken from them by the Local Government Act, 1894, in rural parishes (c), and, by the provisions of the London Government Act, 1899 (d), churchwardens of every parish within a metropolitan borough have ceased to be overseers.

Such, then, in general, are the duties of churchwardens; and, in populous parishes, for the better discharge of their duties, provision was made for a *vestry clerk* to assist them (e). We will add, in conclusion, that churchwardens, in case of their wasting the goods of the church, or being guilty of other misbehaviour, are liable to removal (f); and that, at the end of their year of office, they are bound to render an account of all their receipts and disbursements (g).

*Sidesmen*, or synodsmen, are elected in many old, and also, without any actual legal status, in many new

(a) Hawk. P. C. bk. i. ch. lxiii. s. 29; *Hawe* v. *Planner* (1666) 1 Saund. 10; S. C., 1 Sid. 301.

(b) 43 Eliz. c. 2, s. 1.

(c) See *post*, bk. iv. pt. iii. ch. vii. (vol. iii. pp. 116–138).

(d) S. 23 (3).

(e) Vestries Act, 1850, ss. 6–8.

(f) Steer, *Parish Law* (6th edn.), 116.

(g) *Ibid.* 115; *Leman* v. *Goulty* (1789) 3 T. R. 3; *Astle* v. *Thomas* (1823) 2 B. & C. 271.



parishes. By canon 90 of 1603, they are to be chosen yearly in Easter week, by the minister and parishioners, or, in case of their disagreement, by the Ordinary.

VIII. PARISH CLERKS and SEXTONS are also persons connected with the church ; and, by the common law, they have freeholds in their offices (*a*). But, under the Lecturers and Parish Clerks Act, 1844, parish clerks may be suspended or removed by the archdeacon or other ordinary for misconduct or neglect (*b*). The parish clerk, in some few instances, is in holy orders (*c*) ; but, in general, his qualification is only that he should be at least twenty years of age, and known to the incumbent or minister to be of honest conversation, and to be sufficient for his office (*d*). He is generally appointed by the incumbent or minister (*e*) ; but, by custom, he may be chosen by the inhabitants of the parish (*f*). His appointment may be either in writing or by word of mouth (*g*) ; and his remuneration usually depends upon the custom of the particular parish (*h*). In churches which are subject to the Church Building Acts, he is appointed annually by the minister (*i*), and in parishes constituted under the New Parishes Acts he is appointed by the incumbent and also removable by him ; but in each case with the consent of the bishop (*k*).

(*a*) Steer, *Parish Law* (6th edn.), 117–121.

(*b*) S. 5.

(*c*) Ss. 2–4.

(*d*) Canon 91 of 1603 ; *Peak v. Bourne* (1733) Str. 942.

(*e*) Canon 91 ; *Pinder v. Barr* (1854) 4 El. & Bl. 105 ; *Lawrence v. Edwards* [1891] 1 Ch. 144 ; 2 Ch. 72.

(*f*) *Parish Clerk, Case of* (1610) 13 Rep. 70 ; *Jermyn's Case* (1624) Cro. Jac. 670 ;

*Hartley v. Cook* (1833) 9 Bing. 728.

(*g*) *R. v. Inhabitants of Bobbing* (1836) 5 A. & E. 682.

(*h*) Steer, *Parish Law* (6th edn.), 118.

(*i*) Church Building Act, 1819, s. 29 ; *Jackson v. Courtenay* (1857) 8 El. & Bl. 8.

(*k*) New Parishes Act, 1856, s. 9.

The sexton (*a*) is, in the ordinary course, chosen by the incumbent, though sometimes by the parishioners, where a usage to that effect prevails (*b*) ; and his salary depends on custom, and is paid by the churchwardens out of any funds in their hands for that purpose. The duty of the sexton is to cleanse the church, to open the pews, to dig the graves for the dead, to provide candles and other necessities, and to prevent or assist in preventing disturbances in the church (*c*). In parishes constituted under the Church Building Acts, the sexton's appointment, and his duties and emoluments, are prescribed by these Acts (*d*) ; and in new parishes, his appointment is like that of the parish clerk (*e*).

In conclusion, we will observe, that, beside the parish clerk and sexton, there is sometimes attached to the church a *beadle*, whose business is to attend the vestry, to give notice of its meetings to the parishioners, and to execute its orders (*f*) ; and in many churches, there are *pew-openers*, *collectors*, and the like. But none of these are, as such, ecclesiastical officers recognised by the law.

(*a*) Apparently, from *sacristan*, the keeper of things belonging to divine worship.

(*b*) Rogers, *Eccles. Law*, 911 ; *R. v. Inhabitants of Bobbing* (1836) 5 A. & E. 682 ; *Cansfield v. Blenkinsop* (1849) 4 Exch. 234.

(*c*) *R. v. Inhabitants of*

*Liverpool* (1789) 3 T. R. 118 ; Shaw, *Parish Law* (7th edn.), 123.

(*d*) Church Building Act, 1819, ss. 6, 10.

(*e*) New Parishes Act, 1856, s. 9.

(*f*) Shaw, *Parish Law* (7th edn.), 148.

## CHAPTER II.

OF THE DOCTRINE AND WORSHIP OF THE CHURCH OF  
ENGLAND, AND HEREIN OF THE LAWS AS TO HERESY  
AND NONCONFORMITY.

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THIS nation has from the earliest times adhered to the principle of an Established Church; and, before the Norman Conquest, the administration of civil and ecclesiastical law was much intermixed. After that event, the distinction between the two became more definite; and, at the era of the Reformation, it was found necessary to resort to the civil legislature for sanction to documents containing an authoritative exposition of the Reformed faith, and for the establishment of appropriate forms of worship. From that era, the power of the ecclesiastical authorities, even in matters of religion and of worship, has been exercised in subordination to the positive enactments of the civil legislature (*a*).

Accordingly, the articles of religion, originally forty-two in number, but afterwards reduced to thirty-nine (and commonly called the 'Thirty-nine Articles'), were framed by Archbishop Cranmer, with the assistance of other persons of distinguished learning and piety, in the reign of Edward the Sixth; and were reduced to their present form in the convocation of the archbishops and bishops of both provinces, held at London in the reign of Queen Elizabeth, A.D. 1562, being finally adopted in 1571. By these articles

(*a*) 24 Hen. 8 (1533) c. 12 v. *Voysey* (1871) L. R. 3 P. C.  
(Act of Appeals); 25 Hen. 8 357; *Sheppard v. Bennett*  
(1534) c. 19 (Act for Sub- (1871) L. R. 4 P. C. 371.  
mission of the Clergy); *Noble*

(among other matters) the canonical authority of the different books of the Bible was declared, a new version of the Holy Scriptures being afterwards made in the reign of James the First, which is still in use under the denomination of King James's Bible. Though there are certain revisions of a comparatively recent date, these have no statutory authority.

The *Liturgy* or *Form of Church Service*, commonly called the *Book of Common Prayer*, was also first framed in the reign of Edward the Sixth, and by the same persons as the articles. Prior to the Reformation, various liturgies had been in use in different parts of the realm (a). But a new ritual (chiefly founded, however, on the antient services), with *rubrics* prescribing the order and form to be pursued, was then compiled, under the direction of that prince, for the uniform observance of the whole reformed Church of England (b). This ritual, which is, for the most part, the same with our present Book of Common Prayer, was established by the statute 2 & 3 Edw. 6 (1548) c. 1; and, being afterwards revised, was confirmed by 5 & 6 Edw. 6 (1551) c. 1, and 1 Eliz. (1558) c. 2. After two other successive revisions, in the reigns of King James the First and King Charles the Second, it was confirmed in its present form, by 14 Car. 2 (1662) c. 4, usually described as 'The Act of Uniformity' (c).

(a) See the preamble to the statute 2 & 3 Edw. 6 (1548) c. 1. Our Liturgy is taken principally from the form called in that preamble *The Use of Sarum*; but most of it can be traced to periods before the Conquest. (See Palmer, *Origines Liturgicæ*.)

(b) *Martin v. Mackonochie* (1868) L. R. 2 P. C. 365; (1870) 3 P. C. 52, 409;

*Elphinstone v. Purchas* (1870) L. R. 3 Adm. & Eccl. 66; *Hebbert v. Purchas* (1871) L. R. 3 P. C. 605.

(c) Wats. *Clerg. Law*, 321. Since the Act of Uniformity, the following changes have been made, viz., the church services for Jan. 30, May 29, Nov. 5, and (in Ireland) Oct. 23, were abolished by 22 Vict. (1859) c. 2; the

The supremacy of the Crown, in matters ecclesiastical, was finally established by 1 Eliz. (1558) c. 1, usually called 'The Act of Supremacy'—a statute which, in the first place, provides that no foreign prince or potentate, spiritual or temporal, shall exercise any manner of jurisdiction or privilege, spiritual or ecclesiastical, within this realm or the dominions thereof; and next, that such jurisdictions and privileges as had before been exercised by any spiritual or ecclesiastical power, for visitation and correction of the Church, shall for ever be united and annexed to the imperial crown of this realm. But the Act of Elizabeth was merely declaratory; for the ecclesiastical supremacy of the Crown had been before claimed by 24 Hen. 8 (1532) c. 12 and 26 Hen. 8 (1534) c. 1, and indeed, prior to the Reformation, by the Statute of Præmunire (16 Ric. 2 (1392) c. 5) (a).

The new regulations thus introduced by Parliament, taken in connection with other legislative enactments of the same era, but of subordinate importance, and in connection also with the canon law, which still gives the rule where the statutes are silent, have constituted, from the period of which we speak, and still constitute, the standard of faith, worship, and discipline in the Church of England; and for a beneficed clergyman advisedly to maintain any doctrine in derogation of the King's supremacy, or of the Thirty-nine Articles, or of the Liturgy as by law established, or to neglect to

Table of Lessons contained in the calendar was revised and re-arranged by the Prayer Book (Tables of Lessons) Act, 1871; and certain modifications were permitted in the order of prayer, on any day except Sunday, Christmas-day, Ash-Wednesday, Good Friday, and Ascension-day, by the Act of Uniformity

Amendment Act, 1872.

(a) Henry the Eighth assumed the title of "Supreme Head in earth of the Church of England." Elizabeth only claimed to be "Supreme Governor of the realm, as well in all spiritual or ecclesiastical things or causes, as temporal."

declare his assent publicly to such articles and liturgy at the time and in the place appointed for that purpose, or to use any other form of prayer than that contained in such Liturgy, is, as we have seen (*a*), ground for deprivation.

And if we now consider, whether this standard is binding merely on those who claim the benefits of the Church establishment, or generally on all the subjects of the realm, we shall find that the law has passed through some very remarkable changes on this head. For, though the Act of Supremacy effected a final emancipation from the papal yoke, and may therefore be justly considered as having laid the foundation of our spiritual freedom, it was not till long afterwards that the nation learned the lesson of religious toleration ; and in the mean time, our temporal laws proceeded not only to imitate the persecutions of the Popish time, but in some respects to surpass them. For, while our law continued to punish the offence of *heresy* as before, employing for that purpose the writ *de hæretico comburendo*, which was not abolished until 1677 (*b*), it began also to exercise new rigours in dealing with the offence of *nonconformity*—*i.e.*, dissent from the worship and ceremonies of the reformed Established Church. So early as the year 1551, by 5 & 6 Edw. 6, c. 1, nonconformity was made a penal offence ; and even to be present at any other form of worship than that which was by law established, rendered the offender liable to imprisonment. By the Act of Uniformity of 1558, a fine of twelve pence, to be levied by the churchwardens for the use of the poor, was (as we have said (*c*)) imposed on such as failed to resort to their proper parish church on Sundays and holidays. And the penal portions of these statutes, though for a long course of time fallen into neglect, yet remained in

(*a*) See *ante*, p. 785.

(*b*) 29 Car. 2, c. 9.

(*c*) See *ante*, p. 793.

our statute book, till, in common with many other penal and disabling laws in regard to religious opinions, they were swept away by the Religious Disabilities Act, 1846, to which we shall make further allusion before we close this chapter. In the reign, moreover, of Queen Elizabeth, a schism began to develop itself in the reformed Church; certain persons, who received the appellation of 'Puritans,' deserting the use of the Liturgy, and, in defiance of the above enactments, betaking themselves to forms of worship of their own institution, and some, under the title of 'Brownists,' actually seceding from the Church (*a*). And ultimately, as they increased in number, they branched out into various divisions of religious opinion, and into various modes of religious ceremonial and church government. From which stock have indeed descended all those Protestant seceders from the Established Church, described in modern times as 'dissenters,' or 'non-conformists,' being also variously designated and distinguished by the specific names of Baptists, Presbyterians, Wesleyans, and the like (*b*).

The jealousies to which these growing innovations gave rise, and the alarm from time to time excited by the enterprising spirit of popery, gave birth to a variety of enactments, which had for their common object the repression of nonconformity and the discouragement of Papists. Thus, by the Act of Uniformity, 1662 (*c*), it was enacted, that the Book of Common Prayer should be used in every place of public worship, and that every teacher of youth should make a written

(*a*) Hallam, *Const. Hist.* vol. i. ch. iv.

(*b*) Statistics are given in Whitaker's *Almanack*. It is often claimed that dissenters are members of the Church of England. They have certain rights in their parish church

(*Taylor v. Timson* (1888) 20 Q. B. D. 671); but they are not therefore in law members of the Church of England. (See *Re Perry Almshouses* [1898] 1 Ch. 391, and *post*, p. 846, n. (*a*).

(*c*) 14 Car. 2, c. 4.

declaration that he would conform to the Liturgy, and would obtain from the Ordinary a licence to teach; and by the Act of 1670 against Conventicles (a), all meetings consisting of five persons or more (exclusive of the family), assembled for the exercise of religion in any manner other than according to the Liturgy and practice of the Church of England, were prohibited and made subject to pecuniary forfeitures.

The Revolution of 1688, however, was the commencement of an era of more liberal legislation in matters of religion; and by the Toleration Act of 1688 (b) persons dissenting from the Church of England (except papists and unitarians) were allowed freely to assemble for religious worship according to their own forms, and in places of meeting duly certified (c); on condition, however, of their taking the oaths of allegiance and of supremacy, and making a declaration against transubstantiation, and (in the case of dissenting ministers) subscribing also to certain of the Thirty-nine Articles. By the Nonconformists Relief Act, 1779, dissenting preachers or teachers were entitled to the benefits of the Toleration Act without signing any of the Articles, on subscribing a declaration professing themselves to be Christians and Protestants, and expressing their belief that the Scriptures contain the revealed will of God, and the rule of doctrine and practice. Then, by the Places of Religious Worship Act, 1812, the Act against Conventicles was repealed, and dissenters were relieved from the necessity of taking any oaths or subscribing any declaration, unless required so to do by some justice of the peace; by the 53 Geo. 3 (1813) c. 160, that clause of the Toleration Act, which excepted unitarians from the benefit

(a) 22 Car. 2, c. 1.

W. Bl. 352; *Harrison v.*

(b) 1 Will. &amp; Mar. c. 18.

*Evans* (1767) 3 Bro. P. C.(c) *R. v. Barker* (1762) 1

465.



of its enactments, was repealed ; and, by the Nonconformist Chapels Act, 1844, the benefits of the above three Acts, viz., the Toleration Act of 1688, the Nonconformists Relief Act, 1779, and 53 Geo. 3, c. 160, were extended to endowments for dissenters made prior to those Acts. In 1855, the law as to the certifying and registering of nonconformist places of worship was amended by the Places of Worship Registration Act (*a*). Ultimately, in order to render the benefits of the Universities of Oxford, Cambridge, and Durham more freely accessible to the nation, it was, by the Universities Tests Act, 1871, enacted that any person might take any degree (other than a divinity degree), in any of these universities, and hold any lay office therein, or in any then subsisting (*b*) college thereof, without either subscribing any article or formulary of faith, or making any declaration or taking any oath respecting his religious belief or profession, or conforming to any religious observance, or attending or abstaining from any form of public worship, or belonging to any specified church, sect, or denomination.

As regards Roman Catholics, most of the severer penalties and disabilities to which they were at one time subject were removed by 18 Geo. 3 (1778) c. 60, the Roman Catholic Relief Act, 1791, and 43 Geo. 3 (1802) c. 30, on condition of their taking such oaths or making such declarations as in those Acts were provided ; and, in particular, assemblies for Roman Catholic worship were legalised on condition of their being held in places duly certified (*c*). Later, by the Roman Catholic Relief Act, 1829 (*d*), Roman Catholics

(*a*) (1855) 18 & 19 Vict. c. 81. (See *post*, pp. 847—848.)

(*b*) *R. v. Hertford College* (1878) 3 Q. B. D. 693.

(*c*) See now Places of Wor-

ship Registration Act, 1855, s. 2.

(*d*) See as to this Act, *Earl of Shrewsbury v. Scott* (1859) 6 C. B. (N.S.) at p. 177 ; and Test Abolition Act, 1867.

were enabled to exercise any franchise or civil right whatever, except in certain cases where their doing so would presumably be prejudicial to Protestantism, as in the case of presenting to a benefice (*a*) ; and, therefore, since the above statute, Roman Catholics have been able to hold any office whatever, except those of guardian or regent of the United Kingdom ; of Lord Chancellor, or Keeper of the Great Seal ; of Lord Chancellor of Ireland ; of Lord Lieutenant, or other chief governor of Ireland ; of Lord High Commissioner to the General Assembly of the Church of Scotland ; or of any office in the Church of England, or in the Church of Scotland, or in the ecclesiastical courts, or certain offices in the universities, colleges, and public schools of this kingdom (*b*). Finally, by other Acts, and principally by the Religious Disabilities Act, 1846, and the Office and Oath Act, 1867, almost all the personal disabilities of Roman Catholics have been removed ; and, by the Roman Catholic Charities Acts, 1832 and 1860, Roman Catholics have been placed practically on the same footing as Protestant dissenters, in the matter of property held for religious or charitable purposes.

The Jews, although they also were formerly, even in England, subject to many hardships and degradations (*c*), and long remained under peculiar disqualifications, have, for some time, also been relieved of their hardships and degradations ; and their disqualifications have mostly been removed (*d*). But a Jew, although an Englishman born, is still incompetent to fill certain high offices in the State, from which (as we have seen)

(*a*) Ss. 16, 17. (And see below, ch. iii. pp. 809—810.)

(*b*) Ss. 12, 17, and 18. (But as to governors or heads of Westminster, Winchester, and Eton, see 14 Car. 2 (1662) c. 4, s. 13.)

(*c*) 2 Inst. 506—509.

(*d*) Religious Disabilities Act, 1846 ; Liberty of Religious Worship Act, 1855, s. 2 ; Jews Relief Act, 1858 ; 29 & 30 Vict. (1866) c. 22.

Roman Catholics are also excluded ; and is also (like Roman Catholics) unable to present to any ecclesiastical benefice, the right of presentation to which may belong to any office in the appointment of the Crown which he may happen to fill (*a*).

As regards marriages (*b*) and burials, first, under the Marriage Act, 1836, and the Marriage and Registration Act, 1856, as amended by the Marriage Act, 1898, marriages can be solemnised in registered nonconformist places of worship in the presence of a registrar of the district or a person duly authorised by the trustees or governing body of the building, or of some other registered building in the same registration district. Secondly, the Burial Laws Amendment Act, 1880, enables burials to take place in a churchyard or other consecrated burial ground without the performance of the burial service of the Church of England, and without the presence of a minister of that Church.

Moreover, nonconformist bodies can now always secure the assistance of the Charity Commissioners in the management of their charities ; and have, further, no difficulty in obtaining the aid of Parliament in effecting changes in their constitution and making regulations which cannot be effected or made without recourse to that aid. Recent instances of such legislation are the United Methodist Church Act, 1907, the Kingswood Whitefield Tabernacle Scheme Confirmation Act, 1907, the Longton Congregational Chapel in Caroline Street Scheme Confirmation Act, 1907, and the Humberstone Wesley Chapel Scheme Confirmation Act, 1911 (*c*).

Thus amply has the law at length provided for the freedom of religious opinions ; but, with all this tolera-

(*a*) Jews Relief Act, 1858, 398.

s. 4.

(*c*) See also *post*, ch. v.

(*b*) See also *ante*, pp. 394—

tion, the rights and pre-eminence of the Established Church are maintained inviolate, and the Church retains, in full possession, all her dignities and endowments, except those which, at the period of the Reformation, she lost by the dissolution of the monasteries.

## CHAPTER III.

OF THE ENDOWMENTS AND PROVISIONS OF THE  
CHURCH.

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WE will now consider the endowments and provisions of the Church. And we shall discuss, first, the property itself of the Church ; secondly, the estates which ecclesiastical persons may hold therein ; and thirdly, the alienation of Church property. It is to be noted, however, that the Church herself is not a corporate body, and has, strictly speaking, no property. What is commonly and for convenience called ‘ Church ‘property’ is the property held for local Church purposes by the various ecclesiastical corporations, aggregate and sole, throughout the country.

I. *As to the property of the Church.*—This property consists of lands, advowsons, and tithes (or tithe rent-charge). The boundaries of Church lands having been often subject to great uncertainty, the Ecclesiastical Corporations Act, 1832, after reciting that the dignitaries of the different cathedral and collegiate churches and chapels of England and Wales, and the societies of the colleges and halls of Oxford and Cambridge and Winchester and Eton, are proprietors of divers lands, the boundaries or quantities and identity of which are disputed, provides, that it shall be lawful for any of the said dignitaries and societies (with the consents in the Act mentioned), to agree with their tenants or under-tenants, or the owners of adjoining heredita-

ments, that any such disputed matters shall be referred to arbitration ; and by this means, the boundaries and identity may be ascertained.

In almost every benefice, there is a parsonage house, which the incumbent is entitled to occupy. And he is bound to keep it in repair, and is liable for the *dilapidations* thereof ; the extent of his liability and the mode of recovering compensation for the dilapidations being now regulated by the Ecclesiastical Dilapidations Acts, 1871 and 1872 (*a*). But the law has made provision for aiding a beneficed clergyman in repairing or rebuilding his house of residence, or in providing a new one ; for the incumbent may, as we have already seen (*b*), raise money to a limited amount, according to the value of the benefice, by mortgage of its profits, or by sale of the existing house, or exchange thereof for another which is more convenient. And by the Sale of Advowsons Act, 1856, it is provided that advowsons vested in, or in trustees for, inhabitants, or other persons forming a numerous class, and deriving no pecuniary advantage therefrom, may be sold by order of such persons, and the proceeds applied to the beneficial purposes therein specified ; which include the erection of a parsonage house if there be none, or the rebuilding, repair, or improvement of any parsonage house already existing.

The incumbent of a living is, in general, seised also of *glebe*, *i.e.*, of land attached to his benefice, and forming part of its endowment ; and, under the Tithe Act, 1842 (*c*), the Board of Agriculture, as now representing the Tithe Commissioners, has power to ascertain and define the boundaries of the glebe lands of any benefice, and, with the consent of the Ordinary and

(*a*) *Jones v. Dangerfield* 2 C. P. D. 562 ; *Re Monk* (1875) 1 Ch. D. 438 ; *Gleaves* (1887) 35 Ch. D. 583.  
*v. Marriner* (1876) 1 Ex. D. (*b*) See *ante*, p. 782.  
 107 ; *Caldow v. Pixell* (1877) (*c*) S. 5,

patron, to exchange such glebe lands for other lands within the same or any adjoining parish, or otherwise conveniently situated.

The parson or rector is seised also of the fabric or edifice of the church itself, and of the churchyard ; and, in the absence of contrary custom, he is liable for the repair of the chancel, the body of the church being repairable by the parishioners (*a*). The case is the same, in the absence of special circumstances, where there is a rectory impropriate and a vicarage ; but the vicar has possession of the church and churchyard for spiritual purposes, and may even be seised thereof as part of his endowment (*b*). And the disposal of the pews and seats in the church appertains, by law, to the Ordinary, that is to say, practically, to the churchwardens, to whom the authority of the Ordinary, in this particular, is delegated ; the chief pew in the church belonging, however, as of right, to the rector, or, in the case of a vicarage, to the impropriator (*c*). But the consent of the Ordinary is still required for the erection of any monument (*d*), although (under the

(*a*) Wats. *Clerg. Law*, 395 ; *Clifford v. Wicks* (1818) 1 B. & Ald. 498 ; *Churton v. Frewen* (1866) L. R. 2 Eq. 634 ; *Greenslade v. Darby* (1868) L. R. 3 Q. B. 421. In the case of churches built under the Church Building and New Parishes Acts, the freehold of the church and churchyard is in the incumbent (see New Parishes Act, 1856, s. 10), except in the case of a church built under the Church Building Act, 1831, to which a parish has not been assigned (*ibid.* s. 9).

(*b*) Wats. *Clerg. Law*, 400 ; *Jones v. Ellis* (1828) 2 Yo. &

*Jer.* 265, 266, 273 ; *Greenslade v. Darby*, *ubi sup.* ; *Batten v. Gedye* (1889) 41 Ch. D. 507 ; *Morley v. Leacroft* [1896] P. 92 ; *Neville v. Kirby* [1898] P. 160.

(*c*) *Clifford v. Wicks*, *ubi sup.* ; *Stileman-Gibbard v. Wilkinson* [1897] 1 Q. B. 749.

(*d*) *Beckwith v. Harding* (1818) 1 B. & Ald. 508 ; *Rich v. Bushnell* (1827) 4 Hagg. Eccl. 164. In the case of the churchyard, this consent is usually given by the incumbent on behalf of the Ordinary (*Keet v. Smith* (1876) 1 P. D. 73).

Consecration of Churchyards Acts, 1867 and 1868) the donor of land to be added to any consecrated churchyard may reserve the right of burial therein, and of erecting monuments and grave-stones therein, for himself, his heirs and assigns, for ever. Moreover, an aisle or side chapel in the church, or a pew in its nave, may be granted, by *faculty* of the Ordinary, to an individual and his heirs, as appurtenant to a particular messuage in the parish; and a man may also prescribe for these, as so appurtenant, without being required to show a faculty (*a*).

*Advowsons* are of the class of hereditaments incorporeal (*b*); an advowson (*advocatio*) being the right of presentation to a rectory, vicarage, or other ecclesiastical benefice. He who has the right of advowson is called the patron (*advocatus* or *patronus*) of the church (*c*). For, in ancient times, lords of manors built churches on their own demesnes, endowed them with glebe, and appointed to be paid to the minister thereof those tithes which before were given to the clergy in common; and he who thus built and endowed a church had of common right a power annexed of nominating any person, canonically qualified, to officiate in that church, of which he was the founder and patron (*d*). And this power is, by derivation of title from the lords of manors and from the dissolved monasteries, now vested in many cases in other private persons, and in corporations, both lay and ecclesiastical (*e*). But neither an alien nor a Roman Catholic

(*a*) Wats. *Clerg. Law*, 388–395; *Crisp v. Martin* (1876) 2 P. D. 15; *Halliday v. Phillips* (1889) 23 Q. B. D. 48.

(*b*) *Vide sup.* bk. ii. pt. i. ch. xxiv.

(*c*) *Mirehouse v. Rennell* (1832) 8 Bing. 490.

(*d*) Co. Litt. 119 b; Gibs. *Cod.* 756, 757.

(*e*) *Keen v. Denny* [1894] 3 Ch. 169. Municipal corporations may not exercise any right of presentation (see *Hine v. Reynolds* (1840) 2 Scott, N. R. 394); but, by the



may exercise the rights of a patron, or present to a living; for if an alien purchase an advowson and a vacancy occur, the Crown presents (*a*), and if a Roman Catholic, the University of Oxford or of Cambridge (*b*). Apparently, a Jew (although unconverted), provided he be the owner of an advowson in his own right, may present (*c*); but should such a person hold any office in the gift of the Crown, to which the right of presentation, or of appointment to any ecclesiastical benefice is annexed, he may not in such a case present, the right of presentation devolving upon the Archbishop of Canterbury for the time being (*d*).

[Advowsons are either *appendant* or *in gross*. So long as the rights of patronage continue annexed to the manor, as some have done from the foundation of the church to this day, the advowson is *appendant*, and will pass, or be conveyed, as incident and *appendant* to the manor, by a grant of the manor only, without adding any other words (*e*).] But where the advowson has been once separated from the manor by legal conveyance, it is called an advowson *in gross* or at large, being annexed no longer to the manor, but to the person of the owner; and where the inheritance either of the manor or of the advowson has been once thus separately conveyed, the advowson remains for ever afterwards an advowson *in gross*, and cannot be made *appendant* again (*f*). An advowson may not

Municipal Corporations Act, 1882, ss. 121, 122, they are to sell any advowsons vested in them.

(*a*) Wats. *Clerg. Law*, 108; Naturalization Act, 1870, s. 2, sub-s. (2).

(*b*) Rogers, *Eccl. Law*, 18; 3 Jac. 1 (1605) c. 5; 1 W. & M. (1689) c. 26; Presentation of Benefices Act, 1713, s. 1; *Edwards v. Bishop of Exeter*

(1839) 5 Bing. N. C. 652; Benefices Act, 1898, s. 7.

(*c*) *Mirchouse v. Rennell* (1832) 8 Bing. 490.

(*d*) Jews Relief Act, 1858, s. 4.

(*e*) This rule does not apply to Crown grants (17 Edw. 2 (1324) c. 17, commonly called *De Prærogativâ Regis*).

(*f*) This is the view of Blackstone; but it seems to

now be sold by public auction, unless it be sold in conjunction with the manor or with the land (not being less than one hundred acres) with which it is associated (a); but before the Benefices Act, 1898, not only the advowson itself but the next presentation to the living (or any number of future presentations) might have been freely sold and conveyed by the owner during an existing incumbency (b). And the grantee of a next presentation so conveyed became, *pro hac vice*, the patron of the church. In any case, if a patron died after a vacancy had happened, the right to present on such vacancy 'for the then next turn,' being as it were a fruit fallen, was considered as personal, and not as real estate (c).

However, now, under the Benefices Act, 1898 (d), the transfer of the right of patronage must be of the whole right of the transferor; and no transfer is valid, unless more than twelve months have at the date of transfer elapsed since the last admission to the benefice. The transfer must, within one month, be registered in the registry of the bishop of the diocese; but a transmission on death or the like, or on the appointment of a new trustee, is not to be deemed a transfer for this purpose. Moreover, the exercise of the right of patronage by any patron is subject to the restrictions imposed by the law of lapse, and by the law of simony; of each of which subjects it is now proper to give some account.

be at variance with that of other authorities (*Ive's Case* (1597) 5 Rep. at 11 b; *Hartopp's and Cock's Case* (1627) Hutt. 88). Perhaps there is a confusion between 'appendant' and 'appurtenant.'

(a) Benefices Act, 1898, s.1.

(b) Co. Litt. 249 a; *Alston*

*v. Atlay* (1837) 7 A. & E. 289; Rogers, *Eccl. Law*, 8-11.

(c) *Mirehouse v. Rennell*, *ubi sup.*; *Welch v. Bp. of Peterborough* (1885) 15 Q. B. D. 432.

(d) S. 1. (See also the Benefices Rules, 1899, W. N. p. 79.)

[*Lapse* is a species of forfeiture, whereby the right of presentation accrues to the Ordinary, by neglect of the patron to present ; to the Metropolitan, by neglect of the Ordinary ; and to the Crown, by neglect of the Metropolitan. For, it being in the interest of religion, and for the good of the public, that the church should be provided with an officiating minister, the law gives this right of lapse, in order to quicken the patron, who might otherwise suffer the church to remain vacant (*a*). The period of neglect, after which the title to present by lapse accrues from the one person entitled to the others successively, is six calendar months, that is, 182 days (*b*), exclusive of the day of the avoidance (*c*). But if the bishop be both patron and Ordinary, he shall not have a double time allowed him in which to collate (*d*) ; the forfeiture accruing whenever the negligence has continued six months in the same person. And if the bishop doth not collate his own clerk immediately to the living on his right by lapse accruing, and the patron presents, though after six months have elapsed, yet the patron's presentation is good ; and the bishop is bound to institute the patron's clerk (*e*). For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn.

So, also, and for the same reason, if the bishop suffers the presentation to lapse to the Metropolitan, the patron may present before the archbishop has filled up the benefice ; but the Ordinary cannot, after lapse to the Metropolitan, collate his own clerk to the

(*a*) 2 Roll. Ab. 364-368, 6 Rep. 62 ; 2 Inst. 361.  
 tit. *Presentment* ; Bract. l. 4, (*c*) Wats. *Clerg. Law*, 111.  
 tr. 2, cap. 3. (*d*) Gibs. *Cod.* 769.  
 (*b*) Wats. *Clerg. Law*, 109- (*e*) 2 Inst. 363 ; Gibs. *Cod.*  
 120 ; *Bp. of Peterborough v.* 770.  
*Catesby* (1607) Cro. Jac. 166 ;

[prejudice of the archbishop (*a*). For, unlike the patron, the Ordinary had no permanent right and interest in the advowson, but merely a temporary one ; and, having neglected to make use of it during the time, he cannot afterwards retrieve his neglect. But if the presentation should lapse to the Crown, prerogative here intervenes and makes a difference ; and the patron shall not recover his right till the King has satisfied his turn by presentation (*b*).

In case the benefice becomes void by death, or by reason of plurality, the patron is bound at his own peril to take notice of the vacancy, the six months running from the date of the vacancy (*c*). But in the case of a vacancy by resignation, or through canonical deprivation, or if a clerk presented be refused for insufficiency—these being matters of which the bishop alone is cognisant—the law requires him to give notice thereof to the patron ; and the six months date only from the time when such notice is given (*d*). But an *ecclesiastical* patron is not entitled to this notice (*e*) ; nor is a lay patron entitled to notice when the vacancy is caused by the conviction for crime of the former occupant (*f*). Neither shall any lapse accrue to the Metropolitan or the Crown in cases where the bishop is precluded, by his having neglected to give notice to the patron, from himself presenting ; for it is universally true, that neither the archbishop nor the Crown shall ever present by lapse, but where the immediate Ordinary might have collated on lapse within the six months, and hath exceeded his time (*g*). Also, if the bishop refuse or neglect to examine and admit the

(*a*) 2 Roll. Ab. 368.

(*b*) *Doctor and Student*,  
d. 2, ch. 36 ; *R. v. Abp. of*  
*Canterbury* (1629) Cro. Car.  
354.

(*c*) Wats. *Clerg. Law*, 5, 6 ;

Rogers, *Eccl. Law*, 578.

(*d*) 13 Eliz. (1571) c. 12,  
s. 7.

(*e*) 2 Roll. Ab. 364.

(*f*) See *ante*, p. 784.

(*g*) Co. Litt. 344 b, 345 a.

[patron's clerk, without good reason assigned, he is styled a *disturber*, and shall not have any title to present by lapse ; for no man shall take advantage of his own wrong (*a*). Also, when the right to presentation is contested, and an action is brought to try the title, making the bishop a defendant, no lapse accrues until the question of right is decided (*b*) ;] and under the Benefices Act, 1898 (*c*), in reckoning the date for lapse, no account is to be taken of the period intervening between the presentation and the bishop's refusal to institute, nor of the period intervening between the bishop's refusal to institute a presentee, and the decision of the Court on such refusal. But the Act (*d*) provides that a patron may not, in respect of the same vacancy, present again the same person whom the bishop has refused ; and any such second presentation is declared void.

[*Simony* is the corrupt procurement of any person to an ecclesiastical benefice, for money, gift, or reward (*e*). Divers Acts of Parliament have from time to time been passed to restrain the practice. First, the 31 Eliz. (1588) c. 6, whereby if any patron, for money or reward, or promise of money or reward, presents a person to any benefice with cure of souls or other ecclesiastical benefice or dignity, both the giver and the taker are to be fined, the presentation is to be void, and the presentee is rendered incapable of ever enjoying the same benefice, and the Crown presents for that turn. Second, the 1 W. & M. (1689) c. 16, which provides that no such simoniacal contract shall prejudice an innocent patron in reversion, or his presentee. Third, the Simony Act, 1713, whereby if any person, for money or reward, or promise of money or reward,

(*a*) 2 Roll. Ab. 365, 366.

(*d*) S. 6.

(*b*) Wats. *Clerg. Law*, 114 ;

(*e*) *Baker v. Rogers* (1600)

2 Burn, *Eccl. Law*, 358.

Cro. Eliz. 788, at p. 790.

(*c*) S. 5.

[procures the next presentation to any living, and is presented to it thereupon, the offender is made subject to all the ecclesiastical penalties of simony, and is disabled from ever holding the benefice ; the presentation devolving to the Crown.] By the Clerical Subscription Act, 1865, every person instituted or collated to any benefice or licensed to any perpetual curacy, lectureship, or preachership, must previously make and subscribe (in addition to the other declarations required by that statute) a declaration that he has not committed simony. The form of this declaration, as appointed by the Benefices Act, 1898 (*a*), and as given in the schedule to that Act; is to the same effect ; and, to prevent any evasion, the words of the declaration are very precise.

[Many questions have arisen in our courts with regard to what is, and what is not, simony ; and among others, these points seem to be clearly settled : —(1) that the purchase of an *advowson*, whether the living be full or not, even by a clerk with a view to present himself, is not simoniacal, unless connected with a corrupt contract or design as to the next presentation (*b*) ; (2) that to purchase a next *presentation*, the living being actually vacant, is simony, that being expressly in the face of the statutes (*c*) ; (3) that for a *clerk* to purchase, either in his own name or in the name of another, the next presentation, even though the living be full, and be thereupon presented at any future time to the living, is simony (*d*) ; but that (4) a bargain by any other person for the next presentation,

(*a*) Sect. 1, sub-s. (4).

(*b*) Bac. Ab. tit. *Simony*  
(A) 233, 234 ; *Bishop of Lincoln v. Wolferstan* (1763) 2 Wils. 174 ; 3 Burr. 1504 ; *Alston v. Atlay* (1836) 6 Nev. & M. 686 ; rev. (1837) 7 A. & E. 289 ; *Walsh v. Bishop of Lincoln* (1875) L. R. 10 C. P.

518.

(*c*) *Baker v. Rogers* (1600) Cro. Eliz. 788.

(*d*) *Winchcombe v. Bishop of Winchester* (1617) Hob. 165. (Of course, at the present day, such a purchase would, except in rare cases, be void. (See *ante*, p. 811.))

[even should the incumbent be *in extremis*, if without the privity, and without any view to the nomination, of the particular clerk afterwards presented, is not simony (a). Under any simoniacal contract made with the patron, although the presentation is void, yet the clerk, if he is innocent of evil intention, is not otherwise prejudiced (b).]

In addition to these points, we may notice, that it has been an occasional practice for the patron to take from the presentee an engagement, usually called a 'resignation bond,' to resign the benefice at a future period, in order to give the patron another opportunity of presenting a clerk. Such engagements, although at one time deemed void, as being simoniacal (c), are now, to a certain extent, sanctioned by law; the Clergy Resignation Bonds Act, 1828, having enacted, that a written promise to resign, if made to the express intent that some particular nominee, or one of two nominees, shall be thereupon presented, shall be valid. But the legality of such an arrangement is subject to the following conditions:—viz., (1) that where there are two prospective nominees, each of them must be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand-nephew of the patron; (2) that the writing must in all cases be deposited, within two months after its date, with the registrar of the diocese, and be open to public inspection; and (3) that the resignation made in pursuance of such engagement must be followed by a presentation, within six months, of the person for whose benefit it is made. These resignation bonds are expressly reserved by the Bene-

(a) *Fox v. Bishop of Chester* (1831) 3 Hagg. Eccl. 659.

(1829) 6 Bing. 1; 3 Bligh (N.S.), 123.

(c) *Dashwood v. Peyton* (1811) 18 Ves. 27; *Fletcher v.*

(b) 3 Inst. 154; *R. v. Bishop of Norwich* (1616) Cro. Jac. 385; *Whish v. Hesse*

*Lord Sondes* (1826) 3 Bing. 501 (reversing S. C. (1822) 5 B. & Ald. 835).

fices Act, 1898, and remain valid ; although by that Act (a) it is now provided, that any agreement for an exercise of the right of patronage in favour, or on the nomination, of any particular person, and any agreement, entered into upon the transfer of the right of patronage, for the re-transfer of the right, or for payment of the consideration otherwise than in cash down, or for the resignation of the benefice in favour of any person, shall be invalid.

*Tithes* are a species of incorporeal hereditament ; and they are capable of being held either by laymen, in the capacity of impropiators, or by the clergy, in right of their churches (b). Tithes were the tenth part of the increase, yearly arising, upon the lands and on the personal industry of the inhabitants of the parish ; the first species being either *prædial*, as in the case of corn, grass, hops (c), and wood (d), or *mixed*, as in the case of wool, milk (e), pigs, &c. (f) ; and the second species being *personal*, as in the case of manual occupations, trades, fisheries, and the like. Of *prædial* and *mixed* tithes, the tenth was formerly payable in gross. But of *personal* tithes, only the tenth part of the clear profits was due ; and *personal* tithes were only due or payable, where and so far as the particular custom of the place authorised the claim (g). [Moreover, whatever was not of annual increase (as stone, lime, chalk, and the like) was not in its nature titheable ; nor was tithe demandable, except

(a) S. 1 (3).

(b) Bac. Ab. *Tythes* (E).  
See *Second Report of Royal Commission on Local Taxation*, 1899, pp. 7, 8.

(c) *Trimmer* v. *Walsh*  
(1862) 4 B. & S. 18 ; on app.  
(1867) L. R. 2 H. L. 208.

(d) 1 Roll. Ab. 635-647 ; 2

Inst. 649-652 ; 5 & 6 Will. 4  
(1835) c. 75.

(e) *Fisher* v. *Birrell* (1841)  
2 Q. B. 239.

(f) 1 Roll. Ab. 635.

(g) *Ibid.* 656 ; 2 & 3 Edw. 6  
(1548) c. 13 ; 7 Bro. P. C. 3 ;  
Com. Dig. *Dismes* (F. 3).



[by force of special custom, in respect of animals *feræ naturæ* (a).

The establishment of tithes in England was, possibly, contemporary with the planting of Christianity in Kent by Saint Augustine about the end of the sixth century ; but the first mention of them in any written English law, occurs in a canon or decree made in a synod of the year 786 (b). And this canon or decree, which at first bound not the laity, was subsequently confirmed in various State councils, only a very few years later than the time when Charlemagne established the payment of tithes in France (c), when he also made a division of them into four parts—one to maintain the edifice of the church, the second to support the poor, the third for the bishop, and the fourth for the parochial clergy (d). And in the laws agreed upon between King Guthrun the Dane and Alfred and his son Edward the Elder, successively kings of England, about the year 900, by the *fædus Edwardi et Guthruni*, which may be found at large in the Anglo-Saxon laws (e), the payment of tithes was enjoined, under a penalty for their non-payment ; which ordinance was maintained and confirmed by King Athelstan, about the year 930 (f).

For some time after the introduction of tithes into England, though every man was obliged to pay tithes in general, yet he might have given them to what priest he pleased, which was called ‘arbitrary’ consecrations of tithes, or he might have paid them into the hands of the bishop, for distribution by him among the

(a) 2 Inst. 651.

(b) Selden, *Tythes*, ch. 8, s. 2.

(c) A.D. 778.

(d) Selden, *Tythes*, ch. 6, s. 7 ; Montesquieu, *Esprit des Loix*, bk. xxxi. c. xii. This

division does not seem to have been ever introduced into England. (See *ante*, p. 770.)

(e) Wilkins, *Leges Anglo-Sax.* pp. 51, 52.

(f) Wilk. *ubi sup.* ; LL. Athel. pp. 54, 55.

[diocesan clergy (a). But when dioceses were divided into parishes, the tithes of each parish were allotted to the particular minister of the parish (b) ; but arbitrary consecrations of tithes continued in general use till the time of King John (c), whereby the income of the parish priests was often scandalously reduced. Pope Innocent the Third, however, about the year 1200, in a decretal epistle sent to the Archbishop of Canterbury, and dated from the Lateran Palace (d), enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited ; which epistle, says Sir Edward Coke, bound not the lay subjects of this realm, but being reasonable and just, it was allowed of, and so became *lex terræ* (e).] And it is now held universally, that tithes, or their equivalent, are due of common right to the parson of the parish, unless there be a special exception.

In some cases, indeed, the vicar, as well as the rector, is entitled to some part of the tithes ; but all tithes, *primâ facie*, and by presumption of law, belong to the rector, except such as can be shown to belong to the vicar (f). The evidence of this may consist either of a deed of endowment, vesting certain tithes in the vicar, or of such long usage as is sufficient to raise the presumption that an endowment of that description, though now lost, was antiently made (g). It sometimes happens, that an endowment of tithes vests all the ‘ small ’ tithes, *eo nomine*, in the vicar (h) ;

(a) Selden, *Tythes*, ch. ix. s. 4 ; 2 Inst. 646, 647 ; *Slade v. Drake* (1618) Hob. 295–297.

(b) Wilk. *ubi sup.* pp. 76, 77, 130 ; LL. Edgar. cc. 1 ; Cnut. ch. xi.

(c) Selden, *Tythes*, ch. 11.

(d) *Opera Innocent.* III. tom. 2, p. 452.

(e) 2 Inst. 641.

(f) *Daws v. Benn* (1823) 1 B. & C. at p. 763 ; *Lewis v. Allnutt* (1828) 2 Bligh (N.S.), at p. 92.

(g) *Jackson v. Walker* (1781) Gwill. 1231 ; *Elsley v. Donnison* (1828) 2 Bligh (N.S.), 94, 103.

(h) Bac. Abr. *Tythes* (K).

and this raises the question, what are 'small' and what 'great' tithes, to determine which no clear line of demarcation seems ever to have been drawn. Yet tithes *mixed* and *personal* are universally agreed to be 'small' tithes (*a*), which are sometimes called also 'privy' tithes (*b*); and, on the other hand, tithes of corn, hay, and wood, are generally regarded as 'great' tithes (*c*).

We have now to inquire, who may be exempted from the payment of tithes. [And here we must notice, first, that certain persons are exempt by reason of some personal privilege; *e.g.*, the Crown, by its prerogative, is discharged from all tithes (*d*). So a vicar shall pay no tithes to the rector, nor the rector to the vicar; the maxim in such cases being: *ecclesia ecclesiæ decimas non solvit* (*e*). But these privileges are personal, both to the Crown and clergy, and extend not to their tenant or lessee of the lands (*f*). Secondly, spiritual corporations were always capable of having their lands totally discharged of tithes in various ways (*g*); and if a man can show his lands to have been formerly abbey lands, immemorially discharged of tithes, that will be a good exemption.

Again, any owner of lands may claim an exemption, either partial or total, from tithes, by reason of a *real composition*. This was an agreement made between the landowner and the incumbent, with the consent of the Ordinary and the patron, that the lands should, for the future, be discharged from the payment of tithes,

(*a*) Bac. Abr. *Tythes* (K).

(*b*) *Clee v. Hall* (1838) 7 Cl. & F. 744.

(*c*) Com. Dig. *Dismes*, G. 1.

(*d*) *Wright v. Wright* (1596) Cro. Eliz. 511; Bac. Abr. *Tythes* (Q); *Compost's Case* (1662) Hardr. 315.

(*e*) *Blinco v. Marston*

(1596) Cro. Eliz. 479; S. C., Moore, 910; *Wright v. Wright*, *ubi sup.*

(*f*) *Blinco v. Marston*, *ubi sup.*; *Wright v. Wright*, *ubi sup.*

(*g*) *Wright v. Gerrard* (1618) Hob. 306, 309.

[by reason of some land or other *real* recompense having been given in lieu and satisfaction thereof (a);] and by the Tithe Act, 1832 (b), every composition for tithes, which had at the date of that Act been made or confirmed by the decree of a court of equity in England, in a suit to which the Ordinary, patron, and incumbent were parties, and which had not been thereafter set aside or departed from, was declared valid in law.

[Moreover, prior to the Tithe Commutation Acts, all persons, spiritual or lay, might claim by custom a *modus*, that is a partial exemption from tithes; as where, by immemorial usage, a particular manner of tithing had been allowed, different from the payment of one-tenth of the annual increase. This customary mode of tithing was sometimes a pecuniary compensation, as twopence per acre for the tithe of land; sometimes it was a compensation in work and labour, as that the parson should have only the twelfth cock of hay and not the tenth, in consideration of the owner's making it for him; and sometimes it was, that in lieu of a large quantity of crude or imperfect tithe, the parson should have a less quantity when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs, or the like. Any means, in short, whereby the general law of tithing was altered, and a new method of taking tithe was introduced, was called a *modus decimandi*, and operated in law as a limited or partial exemption. But a *modus decimandi*, in order to be valid, must have had the following characteristics:—(1) it must have been certain and invariable (c); (2) the thing substituted for tithe must have been beneficial to the parson himself (d)—thus, a *modus* to repair the

(a) 2 Inst. 490; '*De Modo  
'Decimandi'* Case (1609) 13  
Rep. 37, 40.  
(b) S. 2.

(c) *Towerson v. Winget*  
(1662) 1 Keb. 602.  
(d) 1 Roll. Ab. 647-652.

[*church*, in lieu of tithes, was not good, because that was an advantage to the parish only, but to repair the *chancel* was a good *modus*, for that was an advantage to the parson ; (3) it must have been something different from the thing compounded for. (*a*)—*e.g.*, one load of hay, in lieu of all tithe hay was no good *modus*, for no parson would *bonâ fide* make a composition to receive less than is due in the same species of tithe ; (4) a man could not be discharged from payment of one species of tithe, by paying a *modus* for another (*b*)—*e.g.*, a *modus* of one penny for every milch cow would discharge the tithe of milch kine, but not of barren cattle ; for tithe is, of common right, due for both, and therefore a *modus* for one would not be a discharge for the other ; (5) the recompense must have been in its nature as durable as the tithes discharged by it (*c*)—and therefore a *modus* that every inhabitant of a house should pay fourpence a year in lieu of the owner's tithes, was no good *modus* ; for possibly the house might not be inhabited, and then the recompense would be lost ; (6) the *modus* must not have been too large, for in that case it was a rank *modus*, and the alleged custom establishing it would have been bad.]

Lastly, an exemption from tithes, either total or partial, might have been claimed under the Tithe Act, 1832, on the ground of *long usage* ; that is, such usage as could be shown to have lasted for a certain period of time, even though short of the time of legal memory. For, by that Act, tithe claimed by a lay person, not being a corporation sole, or by a corporation aggregate, may be defeated in general by a usage of non-payment for thirty years ; and when claimed by an ecclesiastical

(*a*) *Sheppard v. Penrose* (1704) 1 Salk. 656.  
(1666) 1 Lev. 179.

(*b*) *Grysmen v. Lewes*  
(1596) Cro. Eliz. 446 ; *Archbp.*  
*of York v. Duke of Newcastle*

(*c*) *Startwpp v. Dodderidge*  
(1705) 2 Salk. 657 ; *Carleton*  
*v. Brightwell* (1728) 2 P. Wms.  
462.

corporation sole, may be defeated in general by a usage of non-payment for sixty-three years (*a*).

But the law on the subject of *modus*, which applies only to tithes payable in kind, has now, though still nominally in force, become practically obsolete. For since the year 1836, a system has been largely carried out for the commutation of tithe into tithe rent-charge, under the provisions of the Tithe Commutation Act, 1836, and the various statutes since passed for the amendment of that Act (*b*). This commutation may be effected in two ways; either, first, by a voluntary parochial agreement entered into by a certain proportion of the parties interested, and confirmed by the board of commissioners to whom this subject has been entrusted (*c*), or, second, by a compulsory award. The basis of the commutation is, in general, the clear average value of the tithes of the parish—or of the composition payable for the same, where they have been compounded for—for the period of seven years, ending Christmas, 1835 (*d*); and the payment of the tithe-commutation is to be half-yearly, the amount fluctuating according to the price of corn. The machinery for ascertaining that price is as follows. In January every year, an advertisement is inserted

(*a*) *Salkeld v. Johnston* (1844) 1 Ha. 196; on app. (1849) 1 Mac. & G. 242; *Dean of Ely v. Cash* (1846) 15 M. & W. 617; on app. *sub nom. Dean of Ely v. Bliss* (1852) 2 De G. M. & G. 459.

(*b*) The Act of 1836 and the amending Acts passed in 1837, 1838, 1839, 1840, 1842, 1846, 1847, 1860, 1878, 1885, 1886, and 1891, are collectively called the Tithe Acts, 1836 to 1891 (Short Titles Act, 1896, sched. ii.). See also the Corn Returns Act,

1882, s. 10; and the Extraordinary Tithe Act, 1897.

(*c*) Tithe Act, 1836, s. 2. This board was subsequently consolidated with that of the Inclosure and Copyhold Commissioners. These commissioners were afterwards called the Land Commissioners (Settled Land Act, 1882, s. 48); and, by the Board of Agriculture Act, 1889, their powers were transferred to the Board of Agriculture.

(*d*) Tithe Act, 1836, s. 37.

in the *London Gazette*, under the authority of the Board of Trade, stating the average price of British wheat, barley, and oats, for the seven years ending on the Thursday before the Christmas-day then last preceding (*a*); and every half-year's payment by each parish is to vary so as to equal the then value (according to the price as so ascertained) of the number of bushels of wheat, barley, and oats, in equal shares, which could then be purchased, according to the prices advertised in January, 1837, by the sum for which the parish tithes were commuted (*b*). And the Acts provide for the apportionment of the total parochial rent-charge, under the superintendence of the commissioners, among the parish lands; regard being had to their average titheable produce and productive quality (*c*). After the apportionment has been confirmed, the lands are absolutely discharged from the payment of tithes, and instead thereof are liable for their proportion of the tithe rent-charge (*d*); and the Acts provide also facilities for the redemption of the tithe rent-charge, at the price of not less than twenty-five years' purchase (*e*). The Acts also provided for the payment of a further extraordinary tithe rent-charge in respect of land cultivated as hop grounds or market gardens (*f*).

The remedy for the recovery of tithe rent-charge used to be by distress and entry only, and not by any sale of the lands (*g*); and, apparently, no action of

(*a*) Corn Returns Act, 1882, ss. 9, 10, 19, repealing s. 56 of the Tithe Act, 1836.

(*b*) Tithe Act, 1836, s. 57; Tithe Act, 1840, s. 20.

(*c*) Tithe Act, 1836, ss. 33, 54, 55, 72; Tithe Act, 1860, ss. 15-17.

(*d*) Tithe Act, 1836, s. 67.

(*e*) Tithe Act, 1846; Tithe

Act, 1860, ss. 32-39; Tithe Act, 1878, ss. 3, 4; Tithe Rent-charge Redemption Act, 1885; Extraordinary Tithe Redemption Act, 1886.

(*f*) Tithe Act, 1836, ss. 40-42; Extraordinary Tithe Acts, 1886 and 1897.

(*g*) *Bailey v. Badham* (1885) 30 Ch. D. 84.

debt lay for the arrears of tithe rent-charge (a). And even under the provisions of the Tithe Act, 1891, whereby the tithe rent-charge is for the future made payable by the landowner, and any future contract of the tenant to pay it is made void (b), the remedy is still only against the land, and not against the person; being either a distress, where the owner is in occupation of the land, or appointment of a receiver of the rents and profits, where he is not in occupation (c). The Act of 1891 does not apply to the rent-charge payable under the Extraordinary Tithe Redemption Act, 1886, except in so far as the latter Act expressly directs that sums recoverable under it shall be recovered as tithe rent-charge (d). But, subject to agreements existing at the passing of the Extraordinary Tithe Redemption Act, 1886, the new rent-charge thereby created is made payable by the landlord. That Act (as amended by the Extraordinary Tithe Act, 1897) directed that extraordinary tithe rent-charge should not be levied on any newly cultivated hop-grounds, orchards, fruit plantations, or market gardens; and provision was made for the commissioners to ascertain the capital value of extraordinary tithe rent-charge on each farm or parcel of land liable thereto. Upon such capital value, when certified by the commissioners, a new fixed rent-charge at the rate of four per cent. was made payable in lieu of the shifting extraordinary rent-charge; and such fixed rent-charge was made redeemable on payment by the landowner of the capital value thereof.

Unless by special provision in the parochial agreement, the Tithe Acts do not extend to Easter offerings, mortuaries, or surplice fees, nor to tithes of fish, nor

(a) *Griffinhoofe v. Daubuz*  
(1854) 4 E. & B. 230; (1855)  
5 E. & B. 746.

(b) S. 1.

(c) S. 2. The proceedings  
are in the county court.

(d) Ss. 9, 10 (4).



(in general) either to *personal* or to *mineral* tithes (*a*) ; nor to payments in lieu of tithes in London (*b*) ; nor to *ad valorem* tithe payments in any city or town under any custom or private Act ; nor to any tithes commuted under any former statute. It follows, therefore, that the former tithe law still retains some importance, and requires to be noticed. At the same time, some branches of that law have for all practical purposes been now superseded ; it being provided by the Tithe Commutation Acts, that if any question shall arise as to any composition real, modus, or exemption from tithe, in respect of any of the lands in any parish, such question shall be settled in the manner provided by these statutes. And in the parochial agreement, or award of the commissioners, due allowance is to be made for every modus or exemption that shall be so established (*c*).

II. *As to the estates of the clergy in their benefices.*—With regard to these, it is to be remarked, that the clergy differ from ordinary proprietors in several particulars. For all ecclesiastical persons take lands and hereditaments, when granted to them for the use of the benefice in perpetuity, to hold to them and their successors, instead of their *heirs* (*d*) ; but the estate of a *rector* or *vicar*, though perpetual as regards his church, is, as regards himself personally, considered for most purposes as an estate for life only, with the fee simple in abeyance (*e*). Ecclesiastical persons

(*a*) Tithe Act, 1836, s. 90 ; *Payne v. Esdaile* (1888) L. R. 13 App. Ca. 613.

(*b*) 37 Hen. 8 (1545) c. 12 ; (c) Tithe Act, 1836, ss. 21, 22 & 23 Car. 2 (1671) c. 15 ; 24, 44, 48 ; *Barker v. Tithe Commissioners* (1843) 11 M. & W. 320.

44 Geo. 3 (1804) c. lxxxix. ; (d) Co. Litt. 300 b ; Wats. *Clerg. Law*, 377, 424.

1 Geo. 4 (1820) c. lix. ; 4 Geo. 4 (1823) c. cxviii. ; 6 Geo. 4 (1825) c. clxxvi. ; 7 Geo. 4 (1826) c. liv. and c. cxvi. ; 44 & 45 Vict. (1881) c. cxcvii. ; (e) Co. Litt. 341 a.

cannot, as such, be seised in tail, nor can corporations sole acquire personalty in their corporate capacity (a) ; nor can they in general hold lands, other than their antient endowments, without a licence in mortmain (b), though there are many statutory exceptions to this latter disability (c).

[III. *As to the alienation of Church property.*—At common law, though an ordinary tenant for life could make no alienation to hold good beyond his own life, yet some tenants for life, where the fee simple was in abeyance, might, with the concurrence of such as had the guardianship of the fee, make leases of equal duration with those granted by tenants in fee simple. And this, in particular, was the case in regard to incumbents of livings, whether rectors or vicars, provided they obtained the consent of the patron and Ordinary (d), or, in case the living was donative, the consent of the patron alone (e). So also bishops and deans, and such other sole ecclesiastical corporations as were seised of the fee simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law required, have made leases for years, or for life, estates in tail, or in fee, without any limitation or control. Such leases or estates might also have been made by archbishops

(a) Wats. *Clerg. Law*, 378 ; *Power v. Banks* [1901] 2 Ch. at p. 495.

(b) See *ante*, vol. i. pp. 342–347.

(c) 29 Car. 2 (1676) c. 8 ; Queen Anne's Bounty Acts, 1706, s. 5 ; and 1714, ss. 4, 21 ; Clergy Residences Repair Act, 1776 ; Queen Anne's Bounty Act, 1803 ; Gifts for Churches Acts, 1803, 1811 ; Glebe Exchange Acts, 1815, 1816 ; Clergy Residences Act,

1826 ; Augmentation of Benefices Act, 1831 ; Church Building Acts, 1838, 1839 ; Queen Anne's Bounty Act, 1840 ; Ecclesiastical Commissioners Act, 1841 ; Episcopal and Capitular Estates Acts, 1851 and 1859 ; Ecclesiastical Leasing Act, 1858, s. 2.

(d) Co. Litt. 44 a ; Bac. Ab. *Leases* (E.) ; *Vivian v. Blomberg* (1836) 3 Bing. (N.C.) 311.

(e) 1 Roll. Abr. 481.

[and bishops, with the confirmation of the dean and chapter ; and by deans, archdeacons, and prebendaries, with the confirmation of the bishop and chapter (*a*), while, if the deanery was donative, the consent of the King alone was required (*b*). And corporations aggregate might have made what estates they pleased in their church or other lands, without the confirmation of any other person whatsoever. But the powers of ecclesiastical persons in regard to alienation have now been greatly altered by statute.

For, first, by the enabling statute 32 Hen. 8 (1540) c. 28, persons seised in fee simple in right of their churches might make leases for three lives or twenty-one years, so as to bind their successors, provided they observed the several requisites and formalities prescribed by that statute ; but by the disabling statute, 1 Eliz. (1559) c. 19, all grants or leases by archbishops and bishops were made void, unless they were for no longer terms than twenty-one years or three lives from the making, and unless they reserved, at the least, the old accustomed yearly rents. Secondly, by force of the statute 13 Eliz. (1571) c. 10 (explained and enforced by the statutes 14 Eliz. (1572) cc. 11 and 14, and 18 Eliz. (1576) c. 11), ecclesiastical corporations, such as cathedrals, collegiate churches, and the like, including also parsons, were restrained from making any grants or leases of their lands, except under conditions aimed at preventing the existing corporators making an undue advantage for themselves at the expense of their successors. Thirdly, ecclesiastical persons with cure of souls were restrained from charging their benefices so as to render them liable for any payment thereout, even in their own time (*c*) ; and this was by force of the statute 13 Eliz. (1571)

(*a*) *Dean of Ely v. Stewart*  
(1740) 2 Atk. 44 ; *Wats. Clerg.*  
*Law*, ch. 44.

(*b*) *Wats. Clerg. Law*, 478 ;  
2 Burn, *Ecc. Law*, 374.

(*c*) *Bac. Abr. Leases* (F.).

[c. 20, under which statute it was held, that an instrument framed as a lease, but amounting in substance and design to a charge, was illegal and void. And not only a completed charge, but any voluntary agreement to charge, was equally void (a).] But loans made to incumbents by the Governors of Queen Anne's Bounty are now excepted from the 13 Eliz. (1571) c. 20.

Such, from the reign of Queen Elizabeth to that of King William the Fourth, continued to be the state of the law in this matter, subject only to the partial relaxations from time to time introduced by various Acts of Parliament. But, in the reign last mentioned, a new series of statutes on the subject of alienation by ecclesiastical persons commenced; and this legislation was continued in substance throughout the succeeding reign.

First, by the Ecclesiastical Leases Act, 1836 (as amended by the Ecclesiastical Leases (Amendment) Act, 1836), no ecclesiastical corporation may grant any new lease *by way of renewal*, until one or more of the persons for whose lives it was granted shall be dead; and then only for the surviving life or lives, together with such new life or lives as shall make up the number, not exceeding three, for which the original lease was granted. And where the previous lease was for forty, thirty, or twenty-one years, the renewed lease may not be granted until fourteen, ten, or seven years of the first term shall have expired respectively; and there can be no renewal for life where the original lease was for years only.

Secondly, by the Ecclesiastical Leases Act, 1842, an incumbent may, with the consent of his patron and bishop, demise for a term not exceeding fourteen years any part of the glebe or other church land for farming

(a) *Hawkins v. Gathercole* Ch. D. 96; *McBean v. Deane* (1855) 24 L. J. Ch. 332; *Ex parte Arrowsmith* (1878) 8 (1885) 30 Ch. D. 520.

purposes; provided the best rent that can be gotten be reserved, and be made payable quarterly, and provided no fine or fore-gift be taken for the lease, and the lessee be not made dispunishable for waste, and the lease contain such covenants as to cultivation, management, and other matters, as the Act particularly specifies (*a*). But no such lease is to be valid, unless it excepts the house of residence, and at least ten acres of land (*b*).

But, thirdly, by the Ecclesiastical Leasing Act, 1842, the land or houses of ecclesiastical corporations (except certain colleges and hospitals) may now be demised on an improving, repairing, or building lease for any term not exceeding ninety-nine years; and leases or licences with respect to watercourses, wayleaves, railroads, and other like easements upon or over the property (*c*), or with respect to the mines, minerals, or quarries (*d*), of such corporations may be made or granted, the provisions of the Act being duly observed. And by the Capitular and Episcopal Estates Act, 1851 (*e*), ecclesiastical corporations may, with the approval of the Church Estates Commissioners (*f*), sell to their lessees the reversion of the corporation in the premises comprised in the lease; and may enfranchise any copyhold or customary land held of any manor belonging to the corporation; and may effect exchanges with their lessees; or may, on the other hand, purchase the interest of such lessees in any corporation lands, or the interest of any holder of copyhold or customary land belonging to the manor. And by the Ecclesiastical Leasing Act, 1858, the Ecclesiastical Commissioners may approve

(*a*) 5 & 6 Vict. c. 27, s. 1.

(*b*) *Ibid.* s. 2.

(*c*) 5 & 6 Vict. c. 108, ss. 1-4.

(*d*) *Ibid.* s. 6; *Doe d. Brammall v. Collinge* (1849) 7 C. B. 939.

(*e*) Amended by the Episcopal and Capitular Estates Acts, 1854, 1859, and Ecclesiastical Commissioners Act, 1860, s. 28.

(*f*) As to these, see *post*, p. 842.

under their seal the lease of any part of the lands or other property of any ecclesiastical corporation, aggregate or sole (except such as are in the Act especially excepted), for such considerations, and for such terms, and under such covenants or agreements on the part of the lessees, and generally in such manner, as to the commissioners shall seem advisable. But, by the Ecclesiastical Commissioners Act, 1860, no lands assigned by the Ecclesiastical Commissioners (*a*) as the endowment of any see may be granted by the archbishop or bishop otherwise than from year to year, or for a term of years in possession not exceeding twenty-one years, at the best annual rent that can be reasonably gotten, without fine; the lessee not to be dispunishable for, or exempted from liability in respect of, waste. And in every such lease, such or the like covenants, conditions, and reservations are to be entered into, reserved, or contained for the benefit of the archbishop or bishop and his successors, as under the Ecclesiastical Leases Act, 1842, are to be contained in a lease for the benefit of the incumbent and his successors, or as near thereto as the circumstances of the case will permit. But the archbishop or bishop may, with the approval of the Church Estates Commissioners, grant mining and building and other leases, for such periods, upon such considerations, and generally in such manner as he may think fit; and a portion of the rent reserved on any such lease may be made payable to the Ecclesiastical Commissioners (*b*).

Finally, by the Glebe Lands Act, 1888, the incumbent of any benefice is enabled, on due notice to the bishop of the diocese and to the patron, and with the approval of the Board of Agriculture (*c*),

(*a*) As to these, see *post*,  
p. 840.

(*b*) 23 & 24 Vict. c. 124, s. 8.

(*c*) Substituted for the Land  
Commissioners by the Board  
of Agriculture Act, 1889.

to procure a sale of his glebe lands, except the parsonage house and the outbuildings, and garden and other land necessary for the convenient enjoyment thereof. If, however, the bishop or patron objects to the sale, and the Board should consider the objection a good one, the sale is not to proceed. But if a sale is effected, the land is sold free from all incumbrances thereon, and also from all annual charges; these incumbrances and charges being respectively transferred to the sale proceeds, which proceeds are payable to the Board of Agriculture, which duly invests the same in the names of the Ecclesiastical Commissioners, to be held upon the same trusts as those to which the lands themselves before sale were subject.

It now only remains to consider *surplice fees*, being fees payable on burials, marriages, and the like (all fees on baptisms being now prohibited (a)), *Easter offerings*, and *mortuaries*—all of which are called *oblations*, and are of great antiquity; having been, indeed, at one time, almost the whole revenue of the Church, until tithes were added.

It is said that no surplice fees are due to the minister as of common right, but that they depend upon special custom only (b); while as to Easter offerings, it has been laid down, that they are due of common right to him who exercises the spiritual functions of the parish, at the rate of twopence per head (in the absence of a custom for more) for all the parishioners of the age of sixteen and upwards (c). The liability to pay oblations, generally, is recognised by the statute law; for by 2 & 3 Edw. 6 (1548) c. 13 (d), it was

(a) Baptismal Fees Abolition Act, 1872.

(b) Com. Dig. *Dismes* (B. 1); *Andrews v. Cawthorne* (1745) Willes, 536.

(c) *Laurence v. Jones* (1724) Bunb. 173; *Egerton v. Still* (1725) *ib.* 198. (But see *R. v. Hall* (1866) L. R. 1 Q. B. 632.)  
(d) S. 10.

provided, that all who, by the laws or customs of the realm, ought to pay offerings, should yearly pay them to the incumbent of the parish at the four most usual offering days, or otherwise at Easter. And by 7 & 8 Will. 3 (1695) c. 6, and the Ecclesiastical Courts Act, 1813 (*a*), it was further provided, that every one should henceforth pay all offerings, oblations, and obventions to those persons to whom they are due (*b*); and oblations are made recoverable before two justices of the peace, where the amount does not exceed 10*l*. But no oblations can be recovered, otherwise than before justices, unless the amount exceeds 10*l*. (or in the case of Quakers, 50*l*.); or unless some matter of title comes in question (*c*). Also, in churches and chapels built under the Church Building Acts, or the New Parishes Acts, of which we shall presently speak more at large, the payment both of fees and of offerings, to the minister and clerk respectively, is specifically provided for (*d*).

*Mortuaries* were a sort of ecclesiastical heriots; being a customary gift claimed by and due to the minister, in very many parishes, on the death of any of his parishioners (*e*). [They seem originally to have been, like lay heriots, only a voluntary bequest to the Church; being intended (as Lyndewoode informs us) as a kind of expiation and amends to the clergy, for the personal tithes and other ecclesiastical duties, which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, after the lord's heriot or best good was taken, the second best chattel

(*a*) S. 4.

(*b*) *Ayrton v. Abbott* (1849) 14 Q. B. 1; Willes, 537-9 (n.).

(*c*) 5 & 6 Will. 4 (1835) c. 74; 4 & 5 Vict. (1841) c. 36.

(*d*) As to the Church Building Acts see below, pp. 838-842; and as to the New

Parishes Acts, *post*, pp. 842-845. The Burial Acts (as to which see *post*, bk. iv. pt. iii. ch. vi., vol. iii., p. 114) contain special provisions as to fees in the burial ground of local authorities.

(*e*) 2 Inst. 491.



[was reserved to the Church as a mortuary (*a*); and in the laws of King Canute, this mortuary is called soul-scot, or *symbolum animæ* (*b*). It was antiently usual in this kingdom to bring the mortuary to church, along with the corpse when it came to be buried; and thence it is sometimes called a *corse-present*, a term which bespeaks it to have been once a voluntary donation. However, in Bracton's time, so early as Henry the Third, it had grown into an obligation; and bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels (*c*). The custom varied in different places, not only as to the mortuary to be paid, but as to the person to whom it was payable. In Wales, a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese; but this was abolished, upon a recompense given to the bishop, by the statute 12 Anne (1713), c. 6. In the archdeaconry of Chester, a custom once prevailed, that the bishop should have, at the death of every clergyman dying therein, his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring (*d*); but this mortuary also was directed to cease by the 28 Geo. 2 (1754) c. 6, which settled upon the bishop an equivalent in its room.

The variety of customs with regard to mortuaries giving frequently a handle to exactions on the one side, and to frauds or expensive litigation on the other, it was thought proper by 21 Hen. 8 (1529) c. 6 to reduce them to some kind of certainty. For this purpose, that statute enacted, that all mortuaries or corse-presents to the parson of any parish should,

(*a*) Co. Litt. 185 b; Lyndw. *Provinc.* l. 1, tit. 3.

(*b*) C. 13 (Wilk. *Leg. Anglo-Sax.* 130).

(*c*) Bract. l. 2, c. 26; Flet. l. 2, c. 57.

(*d*) *Hinde v. Bishop of Chester* (1631) Cro. Car. 237.

[unless where by custom less or none at all was due, be taken in the following manner: viz., for every person dying therein who did not leave goods to the value of ten marks, nothing; for every person who left goods to the value of ten marks, and under thirty pounds, 3s. 4d.; if above thirty pounds, and under forty pounds, 6s. 8d.; if above forty pounds, of what value soever, 10s. and no more. And no mortuary was to be paid, in any parish, in respect of a *feme covert*, nor in respect of any child or person not being a householder therein, nor in respect of any wayfaring man, whose mortuary was to be paid in the parish in which he had his usual residence. And upon this statute, as amended in manner previously described (a), stands the law of mortuaries to this day.]

(a) See *ante*, p. 834.

## CHAPTER IV.

OF NEW ECCLESIASTICAL DISTRICTS AND PARISHES,  
AND OTHER EXTENSIONS OF THE CHURCH.

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THE spiritual ministrations of the Church are mainly entrusted to the parochial clergy ; in other words, to the rectors and vicars of the different parishes of which the realm is composed, together with the curates whom they employ for their assistance. Each parish contains a church, the parochial division of the kingdom being indeed itself referable to the erection of churches therein ; and there are, comparatively, but very few and scanty portions of territory which have remained extra-parochial.

But in certain parishes, in addition to the parish churches, *chapels* were at an early period founded, in which divine service, and, in some instances, the rites of sacrament and burial, might be lawfully celebrated, in the same manner as in the parochial churches themselves. Such chapels are of various descriptions. Some are *private*, being erected for the use only of particular persons of rank, to whom this privilege was conceded by the proper authorities ; and such chapels are free from the control of the incumbent of the parish church (*a*). Others are *public*, and designed for the benefit of particular districts lying within the

(*a*) 1 Burn, *Eccl. Law*, 296 ; C. P. D. 390. (See, as to *Chapman v. Jones*, (1869) chapels belonging to institutions, the Private Chapels L. R. 4 Ex. 273 ; *Duke of Norfolk v. Arbutnot* (1879) 4 Act, 1871.) C. P. D. 290 ; aff. (1880) 5

parochial ambit ; these latter having been, in general, founded at some date later than the parish church itself, for the accommodation of such of the parishioners as lived too far from the parish church ; whence public chapels so circumstanced are described as *chapels of ease* (a).

Public chapels are, in general, subject to the control of the incumbent of the parish church ; although, under the Church Building Acts, 1831 and 1838, they may be made independent. But there are some chapels of ease which seem to have been coeval with, and always independent of, the parish church, and to have been designed for the benefit of particular districts never included within the pale of the parish church, though locally embraced by the parochial division (b). Chapels of ease are thus either *parochial*, in which both divine worship and the rites of marriage and burial are performed, or mere chapels of ease, designed for divine worship only. But as to chapels of ease of both descriptions, these doctrines equally prevail : that of common right the nomination to them is in the incumbent of the parish church, and cannot be taken from him except by agreement between himself, the patron, and the Ordinary (c) ; and that the establishment of a chapel of ease in any parish does not of itself deprive the inhabitants accommodated therein of the right of resorting to the parish church, nor, on the other hand, does it exempt them from any parochial burthen to which they would otherwise be liable (d). Whence also it is, apparently, that the rector or vicar may, under the provisions of the Augmentation of Benefices Act, 1831, and the

(a) 1 Burn, *Eccl. Law*, 299.

(b) *Craven v. Sanderson* (1838) 7 A. & E. 880.

(c) 1 Burn, *Eccl. Law*, 299—307 ; *Dixon v. Kershaw* (1766)

Amb. 528 ; *Farnworth v. Bishop of Chester* (1825) 4 B. & C. 555, 568.

(d) *Ball v. Cross* (1689) 1 Salk. 164.

District Church Tithes Act, 1865, annex or appropriate to any such chapel of ease portions of the endowments proper of the parish church.

There are also certain chapels which are called *free chapels*, because not liable to the visitation of the Ordinary; and these, it is said, are always of royal foundation, or else have been founded by private persons by virtue of a Crown licence in that behalf (*a*).

To the number of chapels thus created in antient times, considerable additions have been made in comparatively modern periods; many new chapels of ease, particularly in towns, having latterly been built and endowed to meet the demands of a population beginning to overflow. Among these may be particularly noticed a species of chapel of more recent introduction, called *proprietary chapels*, because they are the property of private persons, who have purchased or erected them with a view to profit or otherwise.

But these additions to our regular church system, though numerous, were not found adequate to the growing wants of the population; and at the beginning of the nineteenth century, the legislature began to apply itself, systematically, to the great object of extending the accommodation afforded by the national Church, so as to make it more nearly commensurate with the wants of the people. A variety of statutes have accordingly been passed for this purpose, which are known by the general denomination of the Church Building Acts (*b*). Under

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| (a) Wats. <i>Clerg. Law</i> , 337,   | (1832) c. 61; 1 & 2 Vict.        |
| 338; 1 Burn, <i>Eccl. Law</i> , 298, | (1838) c. 107; 2 & 3 Vict.       |
| 299.                                 | (1839) c. 49; 3 & 4 Vict.        |
| (b) 58 Geo. 3 (1818) c. 45;          | (1840) c. 60; 4 & 5 Vict.        |
| 59 Geo. 3 (1819) c. 134; 3           | (1841) c. 38, s. 19; 6 & 7       |
| Geo. 4 (1822) c. 72; 5 Geo. 4        | Vict. (1843) c. 37, s. 24; 7 & 8 |
| (1824) c. 103; 7 & 8 Geo. 4          | Vict. (1844) c. 56; 8 & 9 Vict.  |
| (1827) c. 72; 1 & 2 Will. 4          | (1845) c. 70; 9 & 10 Vict.       |
| (1831) c. 38; 2 & 3 Will. 4          | (1846) c. 68; 11 & 12 Vict.      |

the authority of the first of these Acts, known as the Million Act, the Crown appointed, for a limited period, a body of commissioners called the Church Building Commissioners, who were directed to ascertain where the accommodation of additional churches and chapels was required; and out of the one million pounds placed at their disposal by Parliament, to cause such churches as they thought necessary to be built, or to assist the parishioners, or any persons subscribing, with grants or loans of money for the building thereof. Other extensive powers were entrusted to these commissioners, with regard to the division of parishes into separate ecclesiastical parishes or separate districts, and also with regard to many other matters of the same general character. But, inasmuch as these statutes contain provisions vastly too numerous and complex for particular notice, and their importance has been partly superseded by the other more recent enactments of which we are about to speak, we shall content ourselves with merely observing that, in the year 1856, the powers of the Church Building Commissioners were transferred to the Ecclesiastical Commissioners (a)—a body which we have already had occasion to refer to, and of which the origin was as follows.

During the course of the legislation upon church building, and upon the division of parishes for ecclesiastical purposes, the zeal of the nation was also gradually excited for the improvement of our ecclesiastical system in other particulars; and, in the year 1835, royal commissioners were appointed to consider

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| (1848) c. 37; 14 & 15 Vict. | 2 Vict. (1838) c. 106, ss. 25,  |
| (1851) c. 97; 17 & 18 Vict. | 30; 9 & 10 Vict. (1846) c. 88.) |
| (1854) c. 32; 19 & 20 Vict. | (a) The Church Building         |
| (1856) c. 55; 32 & 33 Vict. | Commissioners (Transfer of      |
| (1869) c. 94; 47 & 48 Vict. | Powers) Act, 1856.              |
| (1884) c. 65. (See also 1 & |                                 |

the state of the several dioceses, with reference to the amount of their revenues, and with a view to the more equal distribution of episcopal duties; to consider also the state of the cathedral and collegiate churches, with a view to the suggestion of such measures as might render them more conducive to the efficiency of the Established Church; and to devise the best mode of providing generally for the cure of souls, with special reference to the matters of the residence or non-residence of the clergy, and pluralities. Reports were in due course made by this royal commission, and were followed by the passing of the Ecclesiastical Commissioners Act, 1836, incorporating 'The Ecclesiastical Commissioners for England,' and empowering them to lay before His Majesty in Council such schemes as might be best adapted to carry into effect the various recommendations contained in the reports; which schemes, when duly ratified by Order in Council, were to have the same effect as if they formed part of the Act (*a*). In pursuance of these provisions, the Ecclesiastical Commissioners, who now include all the bishops of England and Wales, and the Lord Chief Justice, as well as some other persons of distinction (*b*), and are required to make an annual report to parliament (*c*), have prepared a variety of schemes which have acquired the force of legislative enactments (*d*).

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| ( <i>a</i> ) Ecclesiastical Commissioners Act, 1836, ss. 10–14.  | (1841) c. 39; 10 & 11 Vict.  |
| ( <i>b</i> ) Ecclesiastical Commissioners Acts, 1836 (ss. 1, 2); 1840 (s. 78).   | (1847) c. 108; 13 & 14 Vict. |
| ( <i>c</i> ) Ecclesiastical Commissioners Act, 1850, s. 26.  | (1850) c. 94; 16 & 17 Vict.  |
| ( <i>d</i> ) The Acts relating to the Ecclesiastical Commissioners are the following:—6 & 7 Will. 4 (1836) c. 77; 3 & 4 Vict. (1840) c. 113; 4 & 5 Vict. | (1853) c. 50; 19 & 20 Vict.  |
|  | (1856) c. 55; 23 & 24 Vict.  |
|  | (1860) c. 124; 29 & 30 Vict. |
|  | (1866) c. 111; 31 & 32 Vict. |
|  | (1868) c. 114; 36 & 37 Vict. |
|  | (1873) c. 64; 38 & 39 Vict.  |
|  | (1875) c. 71; 48 & 49 Vict.  |
|  | (1885) cc. 31 and 55.        |

Thereby (among many other improvements) various alterations have been made in the arrangement and limits of dioceses; the sees of Gloucester and Bristol have been united, and have been again disunited (*a*); provision has been made for additional bishoprics being established (*b*) and for the provision of episcopal residences (*c*); and, in order to augment the income of the poorer bishoprics, contribution has been made from time to time from the revenues of the richer bishoprics, the rights of the existing prelates being saved. Also, by the Ecclesiastical Commissioners Acts, 1840 and 1841, commonly called the Cathedral Acts (*d*), provision has been made for the suspension of a large number of canonries, subject, in certain events, to a power of revival, upon condition of their being newly endowed (*e*); for the suppression of all sinecure rectories (*f*); for the suppression of certain deaneries (*g*); for the vesting of the estates and profits of all such preferments, together with the endowments of non-residentiary prebends, and of some other dignities and offices, in the Ecclesiastical Commissioners (*h*); and for the consolidation of all the property so vested, with the accruing interest, into a common fund, to be applied in making additional provision for the cure of souls, in parishes where such assistance shall be most

(*a*) Bishopric of Bristol Act, 1884; and Amendment Act, 1896.

(*b*) Bishopric of Saint Albans Act, 1875; Bishopric of Truro Act, 1876; Bishoprics Act, 1878; Bishoprics of Southwark and Birmingham Act, 1904; Bishoprics of Sheffield, &c., Act, 1913.

(*c*) Ecclesiastical Houses of Residence Act, 1842.

(*d*) See also Welsh Cathedrals Act, 1843; Ecclesi-

astical Commissioners Acts, 1860 and 1868; and Cathedral Acts Amendment Act, 1873.

(*e*) Ecclesiastical Commissioners Act, 1840, s. 20.

(*f*) Ecclesiastical Commissioners Acts, 1840, ss. 48, 54; 1841, s. 17.

(*g*) Ecclesiastical Commissioners Acts, 1840, ss. 21, 51; 1841, s. 6.

(*h*) Ecclesiastical Commissioners Acts, 1840, ss. 49–51; 1841, ss. 6, 7, 8.



required (a). For the better management of all matters connected with the sale and purchase or leasing of Church lands, a special committee of the Ecclesiastical Commissioners has been appointed, called 'The Church Estates Commissioners' (b).

Provisions of a not less important character, and of a still more recent date, with reference to the same great object of putting the Church into a state of full efficiency, have been made by the New Parishes Acts, 1843, 1844, and 1856; the first and second of these being also sometimes called Sir Robert Peel's Acts, and the third of them the Marquis of Blandford's Act (c). The first of these provides, in particular, that the Ecclesiastical Commissioners may form, out of the larger and more populous parishes, separate districts for spiritual purposes, sometimes called 'Peel districts'; the scheme being in each case first laid before the incumbent and patron, so as to give them the opportunity of making such remarks thereon or objections thereto as may occur to them (d). And upon the district being thus constituted, a minister is to be nominated thereto, with an income of not less than 100*l.* per annum (e); and the right of nomination thereto may be assigned to any ecclesiastical corporation, or to the Universities of Oxford, Cambridge, or Durham, or to any of their colleges, or to any private person or his nominee or nominees, upon condition of contributing, in a certain proportion, to the permanent endowment of the minister, or towards a church or

(a) Ecclesiastical Commissioners Acts, 1840, s. 67; 1860, s. 12. (And see the Archdeaconry of Cornwall Act, 1897, and the Archdeaconry of London (Additional Endowment) Act, 1897.)

(b) Ecclesiastical Commissioners Act, 1850.

(c) There are also the New Parishes Act and Church Building Acts Amendment Acts, 1869 and 1884; and (as regards the Isle of Man) 60 & 61 Vict. (1897) c. 33.

(d) New Parishes Act, 1843, s. 9.

(e) *Ibid.*

chapel for the district (a). But, until the patronage is so assigned, the right of nomination belongs, alternately, to His Majesty and to the bishop of the diocese (b); and the charity property of the parish may be apportioned between and among the separate districts (c). The funds placed in the hands of the Ecclesiastical Commissioners are made available for the purpose of endowing or augmenting the income of the ministers of the new districts, to such an amount, and in such proportion and manner, as the Commissioners may recommend (d).

At any time after the constitution of a district, and while it is still unprovided with a church, the bishop is empowered to license any building within the same, for the performance of divine service (e). He may also license the nominated minister to perform in the district any pastoral duties, with the exception only of burials and marriages; and the minister so licensed is to be considered as having, to that extent, the cure of souls within the district, independently of the incumbent of the parish church, and he is to be a body corporate, with perpetual succession, by the style of the 'minister' of such district (f). But after a church or chapel has been built or purchased for the district, and approved by the Commissioners by an instrument under their common seal, and duly consecrated, the district becomes a new parish for ecclesiastical purposes; and thereupon it becomes lawful to solemnise marriages, baptisms, churchings, and burials therein (g). And the minister, having been

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| (a) S. 20.                           | to new parishes, ss. 1, 2, 14,     |
| (b) S. 21; Act of 1844, s. 1.        | 15 of the New Parishes Act,        |
| (c) Church Building Act,             | 1856; <i>Cronshaw v. Wigan</i>     |
| 1845, s. 22.                         | <i>Burial Board</i> (1873) L. R. 8 |
| (d) New Parishes Act, 1843,          | Q. B. 217; <i>Fuller v. Alford</i> |
| s. 19.                               | (1883) 10 Q. B. D. 418;            |
| (e) <i>Ibid.</i> s. 13.              | <i>Hughes v. Lloyd</i> (1888) 22   |
| (f) <i>Ibid.</i> ss. 11, 12.         | Q. B. D. 157.)                     |
| (g) <i>Ibid.</i> s. 15. (See also as |                                    |

first duly licensed by the bishop to such church, thereupon *ipso facto* becomes the vicar thereof; and the new church is styled and designated a vicarage, and is deemed to be a benefice with cure of souls to all intents and purposes (*a*). Two fit persons, being members of the Church of England, are to be annually chosen, one by the vicar and the other by the inhabitants of the new parish, as churchwardens; and they are charged with all the ordinary duties of churchwardens in ecclesiastical matters, but not with any duties as overseers of the poor (*b*).

By the New Parishes Act, 1843, no new district could be constituted if there already existed within its limits any consecrated church or chapel in use for divine worship (*c*). But this restriction was taken away by the New Parishes Act, 1856, whereby the Ecclesiastical Commissioners are empowered, on the constitution of any new district, to specify some existing or intended church within it, as the parish church thereof; and the incumbent of such church is made liable for the performance of all pastoral duties within the limits of the new parish (*d*). The Commissioners are also empowered by this Act to recommend the constitution of such a district, without the permanent endowment required by the New Parishes Act, 1843, if it shall appear to them that there is reason to expect, from other sources, an adequate maintenance for the incumbent (*e*); and the Commissioners may also, with the consent of the bishop, order that pew rents may be taken in any

(*a*) Incumbents Act, 1868; vestries in old parishes (*E. v. Barrow* (1869) L. R. 4 Q. B. 577).

(*b*) Act of 1843, s. 17. (See also Church Building Acts, 1818, s. 73; 1831, ss. 16, 25; 1845, ss. 5-8.) Vestries for these new parishes are not

(*c*) S. 9.

(*d*) New Parishes Act, 1856, ss. 1, 2.

(*e*) *Ibid.* s. 3.

subject to the same rules as

church to which a district may be assigned, if other sources of income are insufficient (*a*).

The New Parishes Act, 1856, contains also a variety of additional enactments with regard to the assignment of the patronage of these new churches, in return for the endowment thereof ; but these are of a character too minute and complicated for detail in this place (*b*). The Act contains also provisions in extension of previous powers of the same general description contained in the Church Building Acts ; and, under these provisions, the Commissioners may, by a scheme duly ratified by the King in Council, divide any parish into two or more distinct and separate parishes for all ecclesiastical purposes whatsoever, and may regulate the duties of the incumbents of the respective divisions, as also the performance of the offices and services in the respective churches, and the fees to be taken for the same respectively, as well as any other matters which it may become necessary or expedient to arrange for, by reason or in consequence of such division ; but any such division of parishes requires the consent of the patron and the bishop, and is in no case to take effect until the next avoidance of the church, unless with the consent in writing of the actual incumbent (*c*). Moreover, any such division may be subsequently annulled, if, from whatever cause, a church is not duly provided for the separated portion, within a reasonable time (*d*).

Proposals have at various times been laid before Parliament, for instance in 1884, to codify the vast mass of statute law contained in the Church Building, Ecclesiastical Commissioners, and New Parishes Acts ; but, so far, without success.

(*a*) New Parishes Act, 1856, ss. 16–22.  
ss. 6–8. (See also New Parishes

(*c*) *Ibid.* s. 25.

Act, 1884, s. 4.)

(*d*) New Parishes Act, 1884,

(*b*) New Parishes Act, 1856, ss. 2, 3.

## CHAPTER V.

## THE NONCONFORMIST CHURCHES.

THE Church of England, as stated in a previous chapter, assumed its present legal position shortly after the dissolution of the monasteries; and in the reign of Edward the Sixth the Thirty-nine Articles and the Book of Common Prayer were framed, ordaining the doctrine and worship of the Established Church. Even in the reign of Edward the Sixth, however, there were people who refused to conform to the State-regulated doctrine and worship, and dissented therefrom. Such people were known as Nonconformists. Sometimes the terms Dissenters, or Free Churchmen, are also applied to them (a).

(a) The principal Nonconformist bodies, collectively referred to as the 'Free Churches,' consist of *Moravians*, founded in 1457; *Congregationalists*, founded 1567–1571, but the Congregational Union of England and Wales was only formed in 1831, and incorporated in 1902; *Baptists*, founded *circa* 1605; the *Society of Friends*, or Quakers, founded *circa* 1647; *Unitarians*, founded *circa* 1682, but the Church as it exists to-day was formed in 1773; *Wesleyan Methodists*, founded *circa* 1738; *Independent Methodists*, founded *circa*

1806; *Primitive Methodists*, founded 1807–1810; *Presbyterian Church of England*, founded 1840 *sub nom.* 'Presbyterian Synod of England in connection with the Church of Scotland,' but the Church as it exists to-day was constituted in 1876; *Salvation Army*, if it can be counted a Free Church, was first commenced in 1865, the present name being adopted in 1880; the churches of the *Methodist New Connexion*, founded 1797, *Bible Christians*, founded 1815, and the *United Methodist Free Churches*, founded 1836, were amalgamated in the year

As has been pointed out, in a former chapter (*a*), severe laws were directed in the sixteenth, seventeenth, and even eighteenth centuries, against the liberty of worship claimed by such persons ; but, as we have also seen, these penal statutes have, in effect, been almost entirely repealed by later and more enlightened legislation. And now the chief (though not the only) remaining legal consequence of the policy which inspired them is that, while the buildings and other property of the Church of England are subject to one set of laws, those of the Nonconformist Churches are governed by another.

Thus, the Places of Religious Worship Registration Act, 1855 (*b*), provides that every place of meeting for religious worship of Protestant dissenters or other Protestants may be certified in writing to the Registrar-General of Births, Deaths, and Marriages, in England through the Superintendent Registrar of Births, Deaths, and Marriages, of the district in which such place is situate (*c*). The registration is to be effected by the minister, proprietor, trustee, occupier or attendant of such place of meeting (*d*). A certificate bearing the seal of the General Register Office, stating that the place therein described is duly certified, and recorded as required by the Act, and remains uncanceled, is obtainable ; and such certificate, if tendered in evidence upon any trial or other judicial proceeding, in any civil

1907, and are now known as the *United Methodist Church*. (The Act of Parliament sanctioning the amalgamation is noticed at p. 851, *post*.) Each of the Free Churches is a quite separate and distinct organisation. In later years, however, there has been a working together in matters that particularly affect Non-

conformists. For this purpose, the National Free Church Council, composed of representatives of each of the Free Churches, has been formed.

(*a*) See *ante*, pp. 800–802.

(*b*) 18 & 19 Vict. c. 81.

(*c*) S. 2.

(*d*) S. 3.

or criminal court, is receivable as evidence of the several facts therein mentioned without any further or other proof thereof (*a*).

By the Liberty of Religious Worship Act, 1855 (*b*), exemption from registration was conferred in the case of any congregation or assembly for religious worship or meeting—(1) in a private dwelling-house or on premises belonging thereto, or (2) occasionally, in any building or buildings not usually appropriated to purposes of religious worship.

Quakers are subject to certain further statutory provisions not generally applicable to other Nonconformists. A special form of declaration was provided for them in the Toleration Act (*c*). They are not forbidden to hold a meeting with doors locked or barred (*d*); and their places of meeting do not, it would seem, require registration. Their marriages may be contracted and solemnised according to their own usages (*e*). The Tithe Act, 1836 (*f*), enabled any distress for recovery of tithe rent-charges in respect of lands in their possession to be levied on the goods, chattels and effects either on the premises or elsewhere; but this anomaly was repealed by the Tithe Act, 1891 (*g*). The burial grounds of Quakers are ordinarily excluded from Orders in Council issued for the purpose of discontinuing the use of burial-places (*h*).

(*a*) S. 11.

(*b*) 18 & 19 Vict. c. 86.

(*c*) 1 W. & M. (1688) s. 13.

Quakers also are allowed to make solemn affirmations in place of oaths for all purposes and on all occasions.

(*d*) Places of Religious Worship Act, 1812, s. 11.

(*e*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 2; Marriage Act, 1840 (3 & 4 Vict. c. 72), s. 5; Marriage Act,

1856 (19 & 20 Vict. c. 119), s. 21; Marriages (Society of Friends) Acts, 1860 (23 Vict. c. 18), s. 1, and 1872 (35 Vict. c. 10).

(*f*) 6 & 7 Will. 4, c. 71, s. 84.

(*g*) 54 Vict. c. 8, s. 11.

(*h*) Burial Acts, 1852 (15 & 16 Vict. c. 83), s. 3, and 1853 (16 & 17 Vict. c. 134), s. 2.

Unitarians, viz., those who deny the doctrine of the Holy Trinity, were subject to additional disabilities by reason of their beliefs. As already stated (*a*), they were excluded from the Toleration Act. They were also disabled from holding any office, civil, military, or ecclesiastical, and upon conviction, for any offence, they were further disabled from instituting any legal proceedings, or from being the guardians of any child, or from acting as executor or administrator, or even from receiving legacies or gifts by deed. These disabilities were only put an end to by the Statute Law Revision Act, 1873 (*b*).

In dealing with Free Churches, it is important to remember, that there are two principal systems by means of one of which the different Free Churches carry on their work. These systems are styled the 'independent system,' mainly adopted by the Congregational, Baptist, Unitarian, and Presbyterian Churches, and the 'Methodist system,' adopted by the various Methodist Churches.

The independent system is peculiarly applicable to those individual churches that have their own trust deeds declaring the trusts upon which the church property is to be held; as is the case among the Congregational, Baptist, Unitarian, and Presbyterian Churches, respectively. The provisions of the various trust deeds may be, and often are, very similar; but, as each individual church is governed by its own trust deed, uniformity does not prevail throughout the whole Free Church (*c*).

(*a*) See *ante*, p. 801.

(*b*) 36 & 37 Vict. c. 91.

(*c*) While each trust deed must be referred to, to see the exact trusts applicable to the individual church, yet it may be stated that, in the case of the Baptist churches,

the general regulations by which these churches' work is governed are to be found in the *Baptist Handbook*, and those of the Presbyterian Church of England in that Church's *Book of Order*.



The Methodist system, on the other hand, does secure uniformity throughout each Connexion of the different Methodist Churches; and this by reason of the fact that the founders of each of such Churches, at an early stage in the Church's history, executed deeds poll declaring the trusts upon which land, purchased for the use of the Church, was to be held, and the religious beliefs and doctrines that were to be taught therein (*a*).

Free Churches are merely voluntary associations governed by such regulations as have been agreed upon. Such regulations, moreover, merely deal with the doctrine, worship, and internal government of the Church, and are, therefore, not subject to be dealt with here. The regulations (it may be said) do not in any way oust the laws of the realm; and, accordingly, any member of the Church, who considers himself aggrieved, may still, as a last resort, apply to the secular courts in support, or defence, of his alleged rights. Upon the question of doctrine, however, by the Nonconformists Chapels Act, 1844 (*b*), it was provided that the religious doctrines or opinions or mode of regulating worship, for the preaching or promotion of which a meeting house has been held, may be collected from twenty-five years' usage, immediately preceding any suit relating to such meeting house, of the congregation frequenting

(*a*) In the Primitive Methodist Church, for example, a deed poll was executed, in 1830, by the founders, Hugh Bourne, James Bourne, and William Clowes; and, in the year 1864, when some land at Walworth, Surrey, was purchased for the use of the Church, some further trusts were declared therein. This latter deed is the Church's Model Deed. In the case of

the United Methodist Church, the United Methodist Church Act, 1907 (7 Edw. 7, c. lxxv.), authorised the adoption of a deed poll of foundation declaring the constitution and doctrinal tenets of the three Churches that amalgamated by virtue of that Act; and such a deed poll was subsequently executed.

(*b*) 7 & 8 Vict. c. 45, s. 2.

the same ; where not expressly stated in the deed of trust thereof.

The only Free Church whose regulations have received statutory recognition is the United Methodist Church, which was formed in the year 1907, on the union of the Churches of the Methodist New Connexion, Bible Christians, and United Methodist Free Church. Power was given by the United Methodist Church Act, 1907 (*a*), to these three Churches to amalgamate (*b*), and to adopt a model deed poll of foundation, declaring and defining the constitution and doctrinal tenets of the United Church, and the terms and conditions of such union, and containing all such provisions as to the election, powers, duties, and privileges of the Conference of the Church, together with such other provisions as, in the judgment of the Conference, might be necessary or desirable for the government and discipline of the Church, with the management and administration of the affairs thereof (*c*). The Act also contained provisions as to the lands held in trust for the Church (*d*). Further, the Act gave power for the Church to sue, and be sued, in the names of the President and Secretary for the time being of the annual Conference of the Church (*e*) ; and provided for the service of legal process on such President and Secretary (*f*). It also enacted, that copies of certain documents, relating to the Church itself, should be received in all courts as sufficient evidence, without production of the original documents (*g*).

Generally speaking, a Free Church is composed of a number of pastorates, circuits, or stations, throughout the country. The independent churches consist of pastorates only, *i.e.*, separate churches which have, as

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| ( <i>a</i> ) 7 Edw. 7, c. lxxv. ( <i>a</i> | ( <i>d</i> ) S. 11. |
| private Act).                              | ( <i>e</i> ) S. 19. |
| ( <i>b</i> ) S. 3.                         | ( <i>f</i> ) S. 20. |
| ( <i>c</i> ) S. 7.                         | ( <i>g</i> ) S. 26. |

before stated, their own trust deeds and own their own church buildings; and while, by reason of affinity or otherwise, such pastorates are associated together for a common purpose, yet there is no binding authority that compels them to remain so associated, or that can in any way exercise dominion over them. By reason of the variation of the trusts upon which the individual churches forming one or other of the independent Free Churches are founded, it is not possible, in a work of this nature, to give any definite information as to the rules applicable, either to such Churches or to the minister or officials thereof. This difficulty does not, however, apply to the Methodist Churches; for their model deeds secure, as has already been stated, uniformity throughout the different churches.

The Methodist Churches are composed of circuits or stations, the church buildings in each circuit being vested in trustees to hold upon trusts similar to those set forth in the model deed poll, or model trust deed, or other document wherein the trusts of the particular Free Church are contained. The powers and duties of the trustees, and the mode of appointing new trustees of such deeds, are dealt with later in this chapter (a).

Among the Methodist Churches, a circuit may be either a sole pastorate, or it may consist of a number of pastorates in the same neighbourhood, the oldest being regarded as the head of the circuit. Each pastorate in a circuit has, in addition to the trustees thereof, its own officials, known as 'stewards' or 'deacons,' who are generally elected by the members, *i.e.*, the persons admitted to fellowship, and worshipping at the church of the pastorate. The circuit is governed by a quarterly meeting; mainly consisting of representatives of the trustees, lay preachers, and the stewards or deacons of each individual church thereof.

(a) See *post*, pp. 858–859.

In the Methodist Churches, the circuits are grouped, geographically, into what are termed *districts*. Annually in each such district a session known as a district meeting or district synod is held, composed of representatives from each circuit, whereat business and other matters specially affecting the district are transacted. The district meeting or synod, in addition to appointing a committee to deal with any matters that may arise during the ensuing year, also appoints representatives to attend the annual Conference or Assembly of the whole of such Church.

The annual Conference, besides receiving and considering reports as to the progress of the Connexion generally, also, when necessary, amends its laws and regulations.

A Free Church is composed of adherents or members meeting together, under the leadership or spiritual guidance of its minister, in fellowship and for public worship.

Each of the Free Churches has its own custom of making and ordaining its ministers; and usually a candidate, before becoming a fully qualified minister, has to undergo a course of training in one of the theological colleges belonging to the particular Free Church. A Nonconformist minister is entitled to be addressed as 'Reverend' (a).

Among the independent Free Churches, any person who has accepted a call may be ordained a minister of a church; and, provided that this call complies with the provisions of the church's trust deed, no legal objection can be made to the person so chosen. The period for which such a call lasts will depend upon the provisions of the trust deed. It may be an appointment for life; or the minister may be removable at the will of the congregation. Where the appointment is for life, a

(a) As to this, see *Keet v. Smith* (1876) 1 P. D. 73, 79.

minister, even though he has expressed his intention of resigning at a future date, is not thereby prevented from withdrawing his resignation and continuing in office (a). Among the Methodist Churches, a candidate for the ministry after passing through a college belonging to the particular Church, becomes a probationer, on a circuit, for a limited term of years. If, at the close of his probation, he satisfies the authorities, he is received, by ordination, into what is known as the 'full ministry.' He is then appointed by the annual Conference, or Assembly, to a circuit or station, in which he labours for a longer or shorter period, afterwards taking up his duties in another circuit (b).

The annual Conference, or Assembly, of each of the Methodist Connexions has the right to direct where a minister shall labour, and may change his sphere of work at will. Although the minister is in the employ of the Conference, yet his salary is paid by the circuit or station of which he is, for the time being, the minister. The circuit or station may be possessed of endowments for such purpose; but usually the amount required is contributed by the members personally. A Nonconformist minister, it may be stated, is not subject to the provisions of the National Insurance Act, 1911 (c), nor,

(a) *Nickson v. Dolphin* (1911) 56 Sol. Jo. 123. (This was the case of a Baptist minister.)

(b) In the Wesleyan Methodist Church a minister may not remain longer than three consecutive years in the same circuit. In recent years, however, this rule has not, by special vote of Conference, been enforced in individual cases. In the Primitive Methodist Church, the same rule formerly applied, but has long been in abeyance; no

time limit being imposed upon the duration of a minister's stay. This is the custom among the other Methodist Churches. A minister is 'invited' by a circuit. The office of minister terminates at the end of what is known as the 'connexional year.'

(c) *Re Employment of Ministers of United Methodist Church; and Re Employment of Ministers, under Probation, of the Wesleyan Methodist Church* (1912) 107 L. T. 143.

it is considered, does he come within the provisions of the Workmen's Compensation Act. A Nonconformist minister may validly officiate, in a duly licensed place, at marriage ceremonies and also at burials; and a baptism by him in the name of the Trinity is good and effectual (a).

The office of minister may be lost by resignation or expulsion. In the case of the independent Free Churches, the provisions of the trust deed must be referred to, in each particular case, before a minister can be expelled. The model deeds of the Methodist Churches, however, specify the events upon the happening of which a minister can be censured, suspended, or excluded from the ministry of the church; and they also direct the manner in which a charge against him is to be investigated. The usual grounds are immorality, erroneous doctrinal teaching, deficiency of ability, and neglect to observe the rules and regulations of the Church.

A Nonconformist minister, like a doctor or medical practitioner, can claim no privilege in respect of confidential communications made to him in the course of his professional duties. But where, by reason of his position, he, by undue influence, secures to himself or his family, gifts, whether *inter vivos* or by will, he may be compelled to make restitution (b).

By the Toleration Act, 1688 (c), a minister, preacher, or teacher of a Nonconformist congregation, is exempt from certain parochial offices, such as that of churchwarden, overseer of the poor, and the like. He is also exempt from serving in the militia, or on a jury. By the Municipal Corporations Act, 1882, a minister is disqualified from being elected alderman or councillor of a town council; although, under the Local Govern-

(a) *Cope v. Barber* (1872) (1807) 14 Ves. 273; *Morley*  
L. R. 7 C. P. 393, 402. v. *Loughnan* [1893] 1 Ch. 736.

(b) *Huquenin v. Baseley* (c) S. 8.

ment Act, 1888, he may be a councillor or alderman of a county council, and, under the London Government Act, 1899, of a metropolitan borough. He is eligible, however, for election to Parliament.

In cases where a house is provided for the minister, which is the custom among the Methodist churches, he is entitled to claim, as occupier, a vote for parliamentary and other elections (*a*).

Nonconformists, whether ministers or laymen, are not eligible for the position of professors of divinity of the Universities of Oxford, Cambridge or Durham, nor for some other offices which are restricted to members of the Church of England (*b*). Certain positions under the Endowed Schools Act, 1869 (*c*), are also not open to Nonconformists.

Nonconformist laymen, with the exception just noticed, are at present under no personal disabilities whatever. Nonconformist undergraduates of Oxford, Cambridge, and Dublin, are exempted from attending any lectures to which they, or if they are under age, their parents or guardians, object upon religious grounds (*d*). Nonconformist students at all public elementary schools, are also exempted from attending any religious observance or any instruction in religious subjects in the school or elsewhere (*e*).

There is no restriction on the purchase by Nonconformists of land for the purposes of their religious worship or otherwise. An assurance, otherwise than by will, to trustees on behalf of a society for religious purposes of land not exceeding two acres, provided

(*a*) *Collier v. King* (1861)  
11 C. B. (N.S.) 14.

(*b*) Universities Tests Act,  
1871 (34 & 35 Vict. c. 26),  
ss. 2, 3 : Universities of  
Oxford and Cambridge Act,  
1877 (40 & 41 Vict. c. 48),  
s. 58.

(*c*) 32 & 33 Vict. c. 56,  
s. 8.

(*d*) Universities Tests Act,  
1871, s. 7.

(*e*) Elementary Education  
Act, 1870 (33 & 34 Vict. c. 75),  
s. 7.

the assurance is made in good faith and for valuable consideration, does not require enrolment under the Mortmain Acts. Land, however, devised to charitable uses must, as has already been stated in a former chapter, be sold within one year after the testator's death, unless the court orders otherwise. Usually land purchased for religious purposes is vested in trustees upon the trusts applicable to the particular Free Church to which they are attached, and not in corporations.

By the Places of Worship Sites Act, 1873 (*a*), any person seised or entitled in fee simple or for life (*b*) of, or to, land of freehold tenure, and having the beneficial interest therein, and being in possession, or being a municipal corporation or parochial authority (*c*), may grant, convey, or enfranchise, by way of gift, sale, or exchange in fee simple, or for any term of years, any quantity of land not exceeding one acre, for a chapel, meeting house, or other place of divine worship, or for the residence of a minister officiating in a place of worship within one mile of such site. If, however, the land ceases to be used for the purposes of the Act, it is thereupon to revert to, and become a portion of, the lands from which it was severed. A special form of grant is contained in the Act (*d*). The assurance is valid; even though the grantor or donor dies within twelve calendar months from the execution thereof.

Further, there is no restriction on the sale of land or buildings that have been used for the purpose of a Non-conformist place of worship; subject, however, to the observance of any provisions in the trust deed regulating the mode of sale (*e*).

(*a*) 36 & 37 Vict. c. 50.

(*b*) In the case of a sale by a life tenant, the party next entitled must join.

(*c*) Places of Worship Sites

Amendment Act, 1882 (45 & 46 Vict. c. 21), s. 1.

(*d*) S. 4.

(*e*) In some of the Methodist Churches, the consent of



The duties of the trustees in whom any property belonging to a Nonconformist Church is vested will, in the case of the independent Free Churches, depend upon the provisions of each trust deed. The model trust deeds of the Methodist Churches usually provide that the trustees are to hold the buildings in trust to permit them to be used for religious worship, and to preserve the fabric, and generally to maintain and keep them in repair; also to let the pews and seats in the buildings. And further provision is usually made as to the manner in which the moneys so received are to be disbursed.

Special statutory provisions have been made for the purpose of appointing *new trustees* of Nonconformist places of worship, and for vesting the property in them. By the Trustees Appointment Act, 1850 (*a*), it was enacted that whenever freehold, leasehold, copyhold (*b*), or customary property has been acquired by any congregation, society, or body of persons associated for religious worship for a church, meeting house, or other place of religious worship, or for a dwelling-house for the minister of such congregation, or for a school with schoolmaster's house and playground, or for a college, or for a hall, or rooms for the meeting or transaction of the business of such congregation, and whether the conveyance, assignment, or other assurance of such property had been taken to, or in favour of, a trustee or trustees to be from time to time appointed, or subject to any trust for such congregation, such

the President and Secretary, for the time being, of the annual Conference, or Assembly, is necessary. (See also exemption No. 9, at p. 862, *post*.)

(*a*) 13 & 14 Vict. c. 28, commonly called 'Peto's Act.'

(*b*) S. 2 contains provisions for the payment of a fine when customary on the occasion of the first appointment of new trustees, and every forty years thereafter while the property continues to be held in trust.

conveyance, assignment, or other assurance should not only vest such property in the party or parties named therein, but should also vest it in their successors in office for the time being. Such successors may be chosen and appointed in the manner provided in the conveyance, assignment, or other assurance, or in any separate deed declaring the trusts thereof, or, if the power of appointment has lapsed, then in such manner as may be agreed upon by such congregation, upon such trusts, subject to the same powers and provisions, as are contained, or referred to, in such conveyance, assignment, or other assurance, or in such separate deed, or instrument, upon which the property was held. But there is nothing to prevent the appointment of new trustees, and a conveyance to them of the legal estate, being carried out in the ordinary way.

The schedule to the Act contains a form of the deed which may be used, evidencing the appointment of new trustees. It is of a special character, and must be under the hand and seal of the chairman of the meeting at which the appointment is made. The deed must be executed in the presence of the meeting, and attested by two witnesses. By an amending Act, viz., the Trustees Appointment Act, 1890 (*a*), the provisions of the Act of 1850 were applied to, and now include, any land required by trustees in connection with any society or body of persons comprising several congregations, or other sects, divisions, or component parts, associated together for any religious purpose for which such land is held in trust (*b*). The powers in the earlier Act were also made effectual to vest land, jointly, in successors in the office of trustee for the time being, and also in the old continuing trustees (*c*). It was further provided by the Act of 1890, that the

(*a*) 53 & 54 Vict. c. 19,  
commonly called 'Fowler's  
'Act.'

(*b*) S. 1.

(*c*) S. 4. (It was mainly  
because of such an omission

statutory powers of appointing new trustees were not, where there was a power of appointment capable of being made under a power in any instrument, to be exercised until a period of twelve months from the date of the occurrence of the vacancy, had expired without such vacancy having been filled up (*a*); but if no proceedings were taken to set aside an appointment under the statutory powers within six months thereafter, such appointment was declared to be valid (*b*).

As already pointed out, Nonconformist places of worship require to be registered. The fact of registration, however, confers advantages; and therefore it will be convenient to summarise here the benefits obtained thereby. They include:—

(1) freedom from the penalties imposed by the Places of Religious Worship Act, 1812 (*c*);

(2) exemption of the buildings used for the purpose of religious worship from poor rate. By the Poor Rate Exemption Act, 1833 (*d*), it was provided that no person should be rated to the poor rate in respect of any church, chapel, meeting house, or premises, or any part thereof, which should be exclusively appropriated to public religious worship; but no exemption is conferred in respect of parts not so exclusively appropriated, from which rent or other profit is derived. The exemption, however, is not taken away by reason of any part of the premises, or any vestry or rooms belonging thereto, being used for Sunday or infant schools, or for the charitable education of the poor. It may be noted that, by virtue of the Sunday and Ragged Schools (Exemption from Rating) Act,

from the earlier Act that the later Act was passed.)

(*a*) S. 5.

(*b*) S. 6.

(*c*) *I.e.*, the penalties imposed on religious assemblies

exceeding a certain number meeting on unregistered premises.

(*d*) 3 & 4 Will. 4, c. 30, s. 1.

1869 (*a*), any building or part of a building used exclusively as a Sunday school or ragged school may be exempted from any rates ;

(3) exemption from highway rate (*b*) ;

(4) exemption from general district rate (*c*) ;

(5) exemption from liability to any expenses of private street works, where the premises are situate outside the metropolis, or in an urban district in which the Private Street Works Act, 1892 (*d*), has been adopted, or in a rural district to which such Act has been applied by order of the Local Government Board. The exemption does not, however, apply where the premises are situate in a district where the Public Health Act, 1875, is administered (*e*), or where they are situate within the metropolis (*f*) ; in which case, although the minister is not liable to the expenses, yet the trustees of the church are (*g*) ;

(6) exemption from property tax, by reason of the fact that the property is vested in trustees for charitable purposes. But the exemption extends only so far as the premises are used for charitable purposes (*h*) ;

(7) freedom from land tax, where the fee simple is vested in the trustees, and no profit is derived from such ownership (*i*). This is also the case where the trustees are merely lessees ;

(*a*) 32 & 33 Vict. c. 40.

(*b*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 27.

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211.

(*d*) 55 & 56 Vict. c. 57.

(*e*) S. 151.

(*f*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 105 ; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102).

(*g*) *Wright v. Ingle* (1885) 16 Q. B. D. 379 ; *Hornsey Local Board v. Brewis* (1890) 60 L. J. M. C. 48.

(*h*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 61.

(*i*) Freedom from land tax may also be claimed by virtue of s. 12 of the Finance Act, 1898 (61 & 62 Vict. c. 10), where the total income does not exceed 160*l.* per annum.

(8) protection against brawling (*a*). Any person guilty of riotous, violent, or indecent behaviour (*b*), in any church or place of religious worship, which is duly certified, whether during the celebration of divine service, or at any other time, or who shall molest, disturb, or misuse any preacher duly authorised to preach therein, is liable to a fine, or may be committed to prison for any period not exceeding two months ;

(9) exemption from the operation of the Charitable Trusts Acts (*c*). The exemption includes school houses and other buildings held upon the same or the like trusts as the registered building itself (*d*). Sales, therefore, of any buildings belonging to the church can be carried out without the consent of the Charity Commissioners ;

(10) marriages may also be solemnised in duly registered places of worship (*e*). By the Marriage Act, 1836 (*f*), it was provided that any proprietor or trustee of such a building might apply to the Superintendent Registrar of the district that the building might be registered for solemnising marriages therein. The application must be accompanied by a certificate signed, in duplicate, by twenty householders, and countersigned by the proprietor or trustees, to the effect that the

(*a*) Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 2.

(*b*) A person may be convicted under the Act even though he was merely asserting a *bonâ fide* claim of right (*Asher v. Calcraft* (1887) 13 Q. B. D. 607).

(*c*) Places of Religious Worship Act, 1855 (18 & 19 Vict. c. 81), s. 9.

(*d*) Charitable Trusts (Places of Religious Worship) Amendment Act, 1894 (57

& 58 Vict. c. 35), s. 4.

(*e*) The certification of a building for the solemnisation of marriages applies to any room or rooms or hall attached thereto, whether under the same roof or not, provided that a means of internal communication exists between the church and the room or rooms (Official Notice issued by the Registrar-General in July, 1913).

(*f*) 6 & 7 Will. 4, c. 85, s. 18.

building has been used by them during one year at least as their usual place of public religious worship, and that they are desirous of its being registered for the solemnisation of marriages. The application is forwarded by the Superintendent Registrar to the Registrar-General, who forthwith registers such building in a book at the General Registry Office. A certificate of such registry is given to the proprietor or trustee; and public notice thereof is advertised by the Superintendent Registrar, in a local newspaper, and also in the *London Gazette*. On the removal of a congregation, its new place of worship may be registered in place of the disused one (*a*). Under the Marriage Act, 1836, marriages must be solemnised with open doors between the hours of 8 A.M. and 3 P.M., in the presence of some registrar of the district in which such registered building is situate, and of two credible witnesses; and certain words must be used in the ceremony (*b*). By the Marriage Act, 1898 (*c*), however, the presence of a registrar may be dispensed with, and the marriage solemnised in the presence of such duly authorised person as therein provided (*d*). Usually the 'authorised person' is the minister of the church. Certain declarations are to be made in the presence of an authorised person. The trustees, or other governing body, of the building are required to certify the name and address of the person or persons duly authorised for that building to the Registrar-

(*a*) S. 19.

(*b*) As to such marriages generally, see *ante*, pp. 393-397.

(*c*) 61 & 62 Vict. c. 58.

(*d*) S. 4. The 'authorised person' is, as stated in the text, usually the minister of the church. To obtain his appointment, the trustees, or governing body, of the church

must fill up, in triplicate, the necessary forms of appointment of the authorised person, and send them, in the first instance, to the Registrar-General. When any minister who was an 'authorised person' dies, or removes outside the district, a new appointment must be made.

General, and to the Superintendent Registrar of the district in which the building is situate (*a*). In cases of the solemnisation of marriages under the Act, the authorised person should, immediately after the marriage, register, in duplicate, in two of the marriage register books (*b*) provided for the purpose, certain particulars; and such entries should be signed by him and by the parties to the marriage and by two witnesses (*c*). The authorised person is required to make quarterly returns, to the Superintendent Registrar of the district, of all such marriages. The Act does not apply to marriages solemnised in accordance with the practice and usages of the Society of Friends (*d*).

Before concluding this chapter, it is desirable to mention the rights which Nonconformists have in regard to burials. A parish churchyard or burial ground is available, as a matter of right, for the burial of every parishioner and inhabitant of the parish and of every person dying therein. And although there is no such right in the case of non-parishioners, yet, by permission of the incumbent and churchwardens, such burials do frequently take place therein. Previously to the passing of the Burial Law Amendment Act, 1880 (*e*), the service at burials in churchyards or in other consecrated burial grounds, must have been that of the Church of England, performed by a duly authorised minister of that Church. Since the passing of that Act, however, any relative, friend, or personal representative responsible for the burial of a deceased

(*a*) S. 6 (3) and (4).

(*b*) These books must be kept in a fireproof iron safe, the key of which must be in the possession of the 'authorised person.' It is not necessary that the safe should be located in the registered building itself, as was formerly

thought to be the case. It may be in a safe where the church's documents are ordinarily kept, and in the possession of the minister or any other official.

(*c*) S. 7.

(*d*) S. 13.

(*e*) 43 & 44 Vict. c. 41.

person may have the burial service performed either without any religious service whatever, or with such religious service at the grave, conducted by any person, as may be considered proper, on giving forty-eight hours' written notice (a) in a form specified in the schedule to the Act, to the rector, vicar, or other incumbent of the parish or ecclesiastical district, that it is intended that the deceased person shall be buried within the churchyard or graveyard (b) of such parish or ecclesiastical district without the performance of the Church of England service (c).

The notice must mention the time at which it is proposed to bury; but, where the time so mentioned is inconvenient, owing to some other service having been previously arranged for, it may be varied. Unless the rector, vicar, or other incumbent otherwise agrees, the burial must be between certain hours (d); and, if a reason is assigned, no burial may take place in a churchyard on a Sunday, Good Friday, or Christmas Day (e). The person responsible for the burial is required, either on the day thereof or the following day, to transmit a certificate, in the form given in the schedule to the Act, of the burial, to the rector, vicar, incumbent, or other officiating minister in charge of the parish or ecclesiastical district, in which the churchyard or graveyard is situate, or to which it belongs, or, in the case of a burial ground vested in a

(a) Where the burial is to take place in the burial ground maintained by a burial authority, a forty-eight hours' notice is not required (Burial Act, 1900 (63 & 64 Vict. c. 15), s. 8). This Act is dealt with subsequently (p. 866).

(b) This includes any burial ground or cemetery vested in any burial board, or provided

under any Act relating to the burial of the dead, in which parishioners have rights of burial.

(c) S. 6.

(d) If between 1st April and 1st October, the hours are 10 A.M. to 6 P.M.; in the other half of the year, the hours are 10 A.M. to 3 P.M.

(e) S. 3.



burial board, to the person keeping the register of burials therein.

By the Burial Act, 1900 (*a*), the burial authority of any burial ground may erect on any part of its burial ground, which is not consecrated or set apart for the exclusive use of any particular denomination, any chapel for the due performance of funeral services. The burial authority is also required, upon proper request and tender of the cost, to erect, furnish, and maintain a chapel for funeral services according to the rites of a particular denomination, in the ground appropriated to the use of that denomination (*b*). Notice of intention to bury in a burial ground should be given at such time, and to such person, as the burial authority may direct; the forty-eight hours' notice required under the Act of 1880 not being applicable in the case of a burial authority (*c*).

(*a*) 63 & 64, Vict. c. 15,      (*b*) S. 2 (2).  
s. 2 (1).                              (*c*) S. 8.

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